1879

Dismissed 11-98 Fed

Jan. 12. 1880
Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 641.

THE COLORADO CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ASHER A. WHITE, ADMINISTRATOR OF SIMON WHITE, DECEASED, LATELY DOING BUSINESS UNDER THE FIRM-NAME AND STYLE OF S. WHITE & CO.

IN ERROR TO FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED NOVEMBER 19, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 641.

THE COLORADO CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ASHER A. WHITE, ADMINISTRATOR OF SIMON WHITE, DECEASED, LATELY DOING BUSINESS UNDER THE FIRM-NAME AND STYLE OF S. WHITE & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print.
Complaint	2	1
Summons	13	6
Demurrer to answer to first cause of action	21	10
Order, demurrer to answer overruled	29	14
Replication to answer to first cause of action	30	14
Replication to answer to second cause of action	24	12
Notice of death of plaintiff	26	13
Order, death suggested and suit revived	28	13
Deposition of Samuel Cline	35	16
Joseph Bohn	75	34
Samuel Strauss	81	37
Stipulation to open depositions	33	16
Order set for trial	91	40
Order, trial jury impaneled, &c	92	40
Order, trial continued and verdict	93	40
Instructions given	95	42
Exhibits	94	41
Instructions asked by plaintiff	99	43
Instructions asked by defendant	104	45
Motion by defendant for new trial	106	46
Order, motion for new trial denied	109	48
Order, judgment	110	48
Motion for rule to turn over goods saved	112	49
Order, motion for rule denied	111	48
Opinion of district judge on motion	113	49
Certificate of division of opinion	127	55
Clerk's certificate	133	57
Stipulation of counsel	135	58
Bond	137	59
Writ of error	140	60
Citation	143	61

1 Circuit court United States, Colorado.

Pleas in the circuit court of the United States for the district of Colorado.

Be it remembered that heretofore and on, to wit, the ninth day of February, A. D. 1878, came J. Q. Charles, esq., and H. C. Dillon, esq., attorneys of record of said court, and filed in said court a certain complaint, and sued out of said court a summons in a certain cause in said court wherein Simon White, doing business under the firm-name and style of S. White & Co., was plaintiff and Colorado Central Railroad Company was defendant.

And the said complaint is in words and figures as follows, to wit:

Complaint.

In the circuit court of the eighth judicial district of the United States sitting within and for the State of Colorado. To the July term, A. D. 1878.

STATE OF COLORADO, *ss:*

2 SIMON WHITE, DOING BUSINESS UNDER the firm-name and style of S. White & Co., plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, DEfendant.

The plaintiff complains and alleges first, for a first cause of action:

I. That the plaintiff is a citizen and resident of the State of Massachusetts, and that the defendant is a corporation duly organized and resident within the State of Colorado aforesaid.

II. That at the times hereinafter mentioned the defendant was a common carrier of goods for hire between the places hereinafter named.

III. That on the first day of January, in the year A. D. one thousand eight hundred and seventy-eight, the plaintiff, acting by one Samuel White, his agent, at Georgetown, in the county of Clear Creek and State of Colorado aforesaid, delivered to the defendant certain goods, the property of the plaintiff, to wit, thirty-three cases containing merchandise, consisting of clothing, boots & shoes, hats & caps, and gents' furnishing goods; three (3) trunks containing merchandise, consisting of clothing, boots and shoes, hats and caps, and gents' furnishing
3 goods, and two forms; for a more particular description of which said goods reference is hereby made to Exhibit A hereto attached and made a part of this complaint; and which said goods were of the value of eleven thousand dollars.

And the defendant as such carrier accepted and received the said goods to be by the said defendant safely and securely carried from Georgetown aforesaid to the city of Denver, in the county of Arapahoe and State of Colorado aforesaid, and at said city of Denver safely and securely delivered to the plaintiff for a reasonable reward to be paid by the plaintiff to the defendant therefor.

IV. That the said defendant did not safely and securely carry the said goods from Georgetown aforesaid to Denver aforesaid and there

securely and safely deliver the same to the plaintiff; but, on the contrary, so carelessly and negligently behaved and conducted itself in regard to said goods, as such carrier, that by and through the carelessness, negligence, and default of the said defendant in that regard the said goods have not been delivered to the plaintiff at Denver aforesaid or elsewhere, but have been wholly destroyed and lost to the plaintiff.

Second. For a second cause of action:

I. That on the fifth day of January, in the year A. D. one thou-
4 sand eight hundred and seventy-eight, at Denver aforesaid, the defendant had the care and custody of divers other goods belonging to the plaintiff, of the number, quantity, quality, description, and value as those in said first cause of action and said Exhibit A mentioned, to be kept and stored safely and securely in its depot or warehouse in Denver aforesaid, and to be delivered to the plaintiff or his duly authorized agent at the said plaintiff's request for a reasonable compensation to be paid to the defendant by the plaintiff.

II. That the defendant did not safely and securely keep and store said goods, and did not safely and securely deliver the same to the plaintiff or to his duly authorized agent, and has not hitherto, although often requested so to do; but, on the contrary, has wholly failed, neglected, and refused so to do. And that not regarding its duty in that behalf while it so had the care and custody of said goods as aforesaid, the defendant did not take due and proper care of the same or any part thereof, but wholly neglected so to do, and took such bad care thereof and acted so negligently and carelessly towards the same that afterwards, on the fifth day of January, in the year aforesaid, at Denver aforesaid, the said goods were wholly destroyed and lost to the plaintiff.

5 Wherefore the plaintiff demands judgment against the defendant for the sum of eleven thousand dollars damages and for interest thereon since the said 5th day of January, 1878, and for costs of suit.

(Signed) SAMUEL WHITE,
Agent for Plaintiff.

CHARLES & DILLON,
Attorneys for Plaintiffs, Denver, Colorado.

Affidavit to complaint.

STATE OF COLORADO,
Arapahoe County, ss:

Be it remembered that on this day personally appeared Samuel White, who having been by me first duly sworn, on oath says, that he is the agent of the plaintiff, that he verifies the foregoing complaint for the reason that the plaintiff is not a resident of Colorado, and is now residing in the State of Massachusetts, and for the further reason that the affiant is better acquainted with the facts stated in said complaint than the plaintiff; that he has read the foregoing complaint and knows of his own knowledge that the matters and things therein stated are true.

(Signed) SAMUEL WHITE.

Subscribed and sworn to before me this ninth day of February, A. D. 1878.

[NOTARIAL SEAL.]
(Signed) LORIN A. STALEY,
Notary Public.

6 EXHIBIT A.

Ex. A, with complaint.

Being an inventory of stock taken at Georgetown, Colorado, January 1st, A. D. 1878, of the stock in trade of S. White & Co., consisting of clothing, boots and shoes, hats and caps, and gents furnishing goods, and delivered to the Colorado Central Railroad Company on the day last aforesaid, to be carried to Denver, Colorado, and being the merchandise contained in the 33 cases, 3 trunks, together with the two forms mentioned in the foregoing complaint, to wit:

8 pr. gaiters.
2 " "
3 " "
12 " "
1 case hats, 3.
28 ties.
8 "
3 "
12 "
3 "
92 "
43 "
2 "
5 pr. cuffs.
1 lot sleeve elastics.
7 25 ties.
38 "
1 doz. h'dk's.
1 " "
1 " "
1 " "
1 " "
1 " "
1 " "

17 "
1 doz. "
1 lot collar buttons.
4 hair brushes.
4 " "
16 " "
1 lot combs.
3 knives
3 "
3 "
3 "
1 lot jewelry.
10 pr. boots.
1 ulster coat.
1 " "
2 reefers.
2 "
8 3 "
1 "

15 boxes cuffs.
136 linen collars.
105 boxes collars.
1 doz. pocket book.
½ " " "
14 " " "
3 " " "
4 " " "
5 " " "
6 " " "
4 " " "
5 " " "
½ doz. h'dk'fs.
1 " "
1 " "
1 " "
2 " "
4 overcoats.
3 "
1 "
1 "
2 "
1 "
1 "
2 "
1 "
6 "
2 "
2 "
4 "
3 "
3 "
1 "
1 "
3 under coats.
6 " "
3 " "
4 " "
3 " "
4 " "
2 " "
8 " "
1 " "
17 pr. overalls.
8 " "

1 reefer.
18 pr. overalls.
6 white shirts.
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
6 " "
11 " "
2 suits.
1 "
1 "
2 "
2 "
1 "
9 3 suits.
1 "
1 "
1 "
1 coat & vest.
3 " "
2 " "
1 " "
2 " "
2 " "
2 " "
3 " "
4 " "
3 " "
3 " "
2 " "
4 " "
4 " "
3 " "
6 " "
3 " "
4 " "
2 " "
80 shirts & drawers.
1 lot ties.
1 show case.
17 p'r drawers.
6 " "
10 18 undershirts.
4 "
14 p'rs overalls.
1 suits.
1 "
1 "
2 "
2 "
2 "
2 "
4 "
3 "
2 "
2 "
3 "
4 coats.
3 "
4 "
5 "
3 "
4 "
4 "
3 "
4 "
1 boy image & suit.
4 coats & vests.
3 " "
2 " "
2 coats & vests.
2 " "
2 " "
12 undershirts.
10 "
12 "
3 coats.
2 "
2 "
3 "
3 "
4 "
2 "
4 "
2 "
2 "
1 "
4 suits.
4 "
4 "
3 "
10 "
5 "
12 p'r boots.
4 boys' suits.
6 " "
4 " "
4 " "
9 " "
6 " "

5 undershirts.
8 "
3 "
3 boys' suits.
3 " "
6 " "
6 " "
5 " "
8 " "
17 Cardigan jackets.
32 vests.
5 Cardigan jackets.
4 " "
4 " "
6 " "
5 scarfs.
5 "
6 Cardigan jackets.
27 undershirts.
9 p'r boots.
7 " "
6 caps.
18 "
1 lot caps.
6 p'r shoes.
14 p'r pants.
11 17 " "
9 " "
17 " "
3 " "
8 " "
10 vests.
8 "
23 black vests.
17 " "
18 " "
15 diagonal.
12 overshirts.
3 " "
18 " "
14 " "
12 " "
18 p'r pants.
19 " "
12 " "
18 " "
10 p'r boots.
10 " "
12 " "
12 " "
11 p'r shoes.
5 p'r boots.
10 " "
10 " "
24 p'r overshoes.
4 boys' suits.
4 " "
15 p'r pants.
8 " "
6 " "
12 " "
5 " "
15 " "
8 " "
5 " "
8 " "
14 " "
4 " "
9 " "
22 " "
21 " "
38 " "
9 " "
9 " "
8 " "
7 " "
25 " "
12 " "
23 " "
20 " "
10 " "
36 "
24 "
1 lot shirts.
18 shirts.
9 "
1 lot suspenders.
1 " gloves.
24 p'r "
1 lot shawl straps.
13 p'r overalls.
1 lot dusters.
24 umbrellas.
1 lot ladies' satchells.
1 " gents' "
15 " "
8 " "
17 vests.
8 "
11 p'r shoes.
12 " "
12 shirts.
15 vests.
17 shirts.
5 p'r pants.
12 " "
6 " "
10 " "
12 " "
20 p'r overalls.

12	p'r boots.	29	overalls.
11	p'r "	21	" "
12	p'r shoes.	3	overalls coats.
11	p'r "	1	" "
12	" "	6	rubber coats.
6	p'r overalls.	8	overshirts.
20	shirts.	13	" "
24	p'r socks.	15	" "
17	" "	18	" "
6	" "	15	" "
1	lot ties.	4	
24	shirts.	7	
12	"	8	
12	1 zinc trunk & contents.	6	" "
	2 trunks & contents.	4	" "
2	p'r blankets & quilts.	4	" "
2	pillows.	22	" "
2	wire stands.	18	" "
	Case No. 1 hats.		Case No. 2 hats.
		2	chandelier & lamps.

(Endorsed:) No. 141. Simon White vs. Colorado Central Railroad Company. Complaint. Filed February 9th, A. D. 1878. (Signed) Edward F. Bishop, clerk. By Henry Sparnick, dep'y. Charles & Dillon, att'ys for pl'ff.

And the said summons is in words and figures as follows, to wit:

13 *Summons.*

In the circuit court of the United States for the district of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

SIMON WHITE, DOING BUSINESS UNDER THE firm name and style of S. White & Co., plaintiff,
versus
COLORADO CENTRAL RAILROAD COMPANY, DEfendant.

Complaint filed in the clerk's office this 9th day of February, A. D. 1878.

The President of the United States of America to Colorado Central Railroad Company, greeting:

You and each of you are hereby notified that an action has been brought in said court by Simon White, doing business under the firm name and style of S. White & Co., plaintiff, against you as defendant to recover the sum of eleven thousand dollars ($11,000) damages, for failure to safely and securely carry certain goods set forth in the complaint filed herein, to which reference is hereby made, from Georgetown, Colorado, to Denver, Colorado, and there securely and safely deliver the same to the plaintiff, and for negligence and carelessness of the said defendant in regard to said goods, whereby said goods were wholly lost

and destroyed to the said plaintiff, and for interest on the said sum from the 5th day of January last past, and costs of suit.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if said service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complainant, for the said sum of eleven thousand dollars ($11,000), interest as aforesaid and costs.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, at the city of Denver, in said district, this 9th day of February, A. D. 1878, and of the Independence of the United States the 102nd year.

{ U. S. CIRCUIT } (Signed) EDWARD F. BISHOP,
{ COURT SEAL. } *Clerk,*
By HENRY SPARNICK,
Deputy Clerk.

Proof of service.

UNITED STATES OF AMERICA,
District of Colorado, ss:

DENVER, *Feb'y* 14, *A. D.* 1878.

I hereby certify that I received the within writ on the 9 day of February, A. D. 1878, and that I have personally served the same upon Charles C. Welch, vice-president of the Colorado Central Railroad Company, of the said defendants, by delivering to him personally a true copy of the within writ, at the day and time as follows: As to Charles C. Welch, at Golden, county of Jefferson, on the fourteenth day of February, A. D. 1878.

This writ therefore returned duly executed, as the law directs, this 14th day of February, A. D. 1877.

(Signed) P. P. WILCOX,
Marshal.

Marshal's fees: Service 1 deft., @ $2 ea., $2.00; actual expenses, $4.25; total, $6.25.

(Indorsed:) Gen. No. 141. Circuit court of the United States, district of Colorado. Simon White, doing business under the firm name and style of S. White & Co., plaintiff, versus Colorado Central Railroad Company, defendant. Summons. Filed this 15th day of February, A. D. 1878. (Signed) Edward F. Bishop, clerk. Charles & Dillon, attorney for plaintiff.

14 And afterwards, and on, to wit, the 16th day of March, A. D. 1878, came the said defendant, by A. H. De France, esq., its attorney, and filed in said court and in said cause its answer to the said complaint.

And the said answer is in words and figures as follows, to wit:

Answer.

In the circuit court of the eighth judicial district of the United States, sitting within and for the State of Colorado. To the July term, A. D. 1878.

STATE OF COLORADO, *ss:*

SIMON WHITE, DOING BUSINESS UNDER THE firm name and style of S. White & Co., plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, DEfendant.

The defendant, by A. H. De France, its attorney, answers the complaint herein; and first, for a defense to the first alleged cause of action, says:

15 I. That it admits that on the first day of January, A. D. 1878, at Georgetown, in the State of Colorado, one Samuel White delivered to the defendant, to be carried by it to Denver in said State, certain goods, to wit, the cases, trunks, and forms mentioned in the complaint, and that it received the same in its capacity as common carrier; but whether the said cases and trunks contained the various items of merchandise in the complaint mentioned or any of such items, or whether the same were of the value of eleven thousand dollars, or of any other particular and definit' value, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

II. That it did afterwards in pursuance thereof safely carry the said goods, to wit, the said cases, trunks, and forms, to Denver aforesaid, and arrived with the same at the place last aforesaid on the morning of the third day of January, A. D. 1878, of all which the plaintiff then and there, to wit, on the day and at the place last aforesaid, had due notice.

III. That at all times after the arrival of said goods at Denver aforesaid, during business hours, until the happening of the fire hereinafter mentioned, the defendant was ready with the said goods at its freight depot at Denver aforesaid, to deliver the same to the plaintiff or his authorized agent, upon the payment of its reasonable charges

16 for the carriage thereof from Georgetown aforesaid; but neither the plaintiff, nor any person or persons for him or in his behalf, was there at Denver aforesaid upon the arrival there of the said goods, or at any time between their said arrival and the time of the occurrence of such fire, ready to pay said charges and to receive said goods.

IV. That after waiting a reasonable length of time upon the plaintiff or his authorized agent to call for and take the said goods away, to wit, at Denver aforesaid, the defendant afterwards, to wit, on the said third day of January, A. D. 1878, unloaded the said goods from its cars and safely deposited the same in its freight depot building or warehouse at Denver aforesaid, the same being a building provided by it for such purposes, of all which the plaintiff then and there had notice.

V. That on the morning of the fifth day of January, A. D. 1878, the said building in which said goods were so stored as aforesaid, and the said cases, trunks and forms, with a portion of the contents of said cases and trunks, were, without any fault or negligence of the defendant, destroyed and consumed by fire.

VI. That at no time after the arrival of said goods at Denver as aforesaid, and before the said fire, did the plaintiff or his authorized

17 agent call for the same, or request the delivery of the said goods by this defendant.

VII. The defendant denies that as such carrier it undertook or agreed safely to deliver the said goods to the plaintiff or his authorized agent at Denver aforesaid, except on the condition that the plaintiff or his authorized agent should be there at its said freight depot ready to receive the same upon their arrival at such place.

VIII. That the plaintiff hath not paid the defendant's reasonable charges for the carriage of said goods aforesaid, nor any part thereof, nor hath he offered to pay the same.

Second. For a defense to the second alleged cause of action the defendant says:

I. That the said goods mentioned and described in the said second alleged cause of action are the same goods mentioned and described in the said first alleged cause of action and not other or different goods; but that as to whether the said cases and trunks contained the number, quantity, quality, or description of goods alleged, or whether the same were of the value of eleven thousand dollars or of any other definite value, the defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

18 II. That it admits that the said goods were in the defendant's care and custody on the morning of the fifth day of January, A. D. 1878, and were in its freight depot building at Denver aforesaid, but denies that it was a bailee thereof for hire or reward.

III. That defendant denies that it did not take due and proper care of the said goods; but on the contrary alleges that from the time the same came into its possession as such bailee it bestowed thereon all the care and diligence which the nature of the bailment required it to bestow, and did take due and proper care thereof.

IV. That on the morning of the fifth day of January, A. D. 1878, and without the fault or negligence of the defendant, the said building in which the said goods then were, caught, and was destroyed by, fire; and that by the said fire and without any fault or negligence of the defendant, or of its agents, servants or employees, or any of such agents, servants or employees, the said goods, to wit, the said cases, trunks and forms, together with a portion of the contents of said cases and trunks, were consumed and destroyed; that by reason hereof, and for no other reason, it hath not been able to and hath not delivered the same to the plaintiff.

V. That all that portion of the said goods which was not destroyed by the said fire as aforesaid, a particular description of which is contained in a schedule thereof marked A hereto annexed and made a part

19 hereof, is still in the possession of the defendant; and that the defendant hath at all times since the said fire, and still is, ready and willing to deliver the same to the plaintiff, but the plaintiff hath not been ready or willing to receive the same.

VI. That after the said goods were so stored as aforesaid in said depot building, and on, to wit, the said third day of January, A. D. 1878, at Denver aforesaid, it was agreed and understood between the plaintiff and the defendant that while the said goods were in the said depot building they were there at the risk of the plaintiff and not at the risk of defendant.

(Signed) COLORADO CENTRAL RAILROAD COMP.,
By W. A. H. LOVELAND, *Prest.*

A. H. DEFRANCE,
Attorney for Defendant, Golden, Colorado.

STATE OF COLORADO,
County of Jefferson, ss:

William N. Babcock, being duly sworn, on his oath says that he is general freight agent of the Colorado Central Railroad Company, the above-named defendant, and that he is familiar with the facts contained in the foregoing answer; that he has read the said answer and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information, belief.

(Signed) WILLIAM N. BABCOCK.

Subscribed & sworn before me this 15th day of March, A. D. 1878, at Golden, Jefferson Co., Colorado.

[NOTARIAL SEAL.] (Signed) CHESTER C. CARPENTER,
Notary Public.

20 SCHEDULE A.

Inventory of goods not destroyed.

Being an inventory of the goods not destroyed by fire referred to in and made a part of the answer.

130 pairs men's pants.
3 men's suits.
68 " coats.
33 " vests.
3 overcoats.
8 cardigan jackets.
55 pair drawers.
45 undershirts.
7 overshirts.
1 coat.
1 cape.
5 pair youths' pants.
8 " coats.
1 pair child's pants.
4 boys' vests.
1 youth's suit.
15 boys' coats.
8 " suits.
14 p'r " pants.
8 " coats.
4 " vests.

(Endorsed:) No. 141. Circuit court. Simon White vs. Colorado Central Railroad Company. Answer. Filed March 16th, A. D. 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparwick, deputy. A. H. De France, attorney for defendant, Golden, Colorado.

21 And afterwards and on, to wit, the 2d day of April, A. D. 1878, came again the said plaintiff, by H. C. Dillon, esq., his attorney, and filed in said court and in said cause his demurrer to the answer of the said defendant to the first cause of action, and his replication to the answer to the second cause of action herein, and the said demurrer is in words and figures as follows, to wit:

Demurrer to answer.

In the circuit court of the United States for the district of Colorado.

STATE OF COLORADO, *ss:*

SIMON WHITE, DOING BUSINESS AS, ETC., plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, DEFENDANT. defendant.

Demurrer to answer to 1st cause of action.

The plaintiff demurs to the defendant's answer to the plaintiff's first

cause of action mentioned in said complaint and to each clause thereof upon the ground:

First. Because, taken as a whole, the facts alleged, admitted, and denied in said answer are not sufficient in law to constitute a defense to said first cause of action.

22 Second. Because the plaintiff was not bound by law to be present as stated in said third and seventh clauses of said answer, in person or by agent to receive said goods upon their arrival in Denver, the point of their destination, nor to pay the said charges thereon and receive the same until a reasonable time had elapsed after receiving actual or personal notice of their arrival from the defendant.

Third. Because the defendant was bound by law to give the plaintiff actual notice of the arrival of said goods, and of their storage in said warehouse; whereas the notice alleged in the second and fourth clauses of said answer to have been given the plaintiff is merely a constructive or implied notice.

Fourth. Because the words "After waiting a reasonable length of time, etc.," pleaded in the fourth clause of said answer, is a conclusion of law, and because the liability of the defendant as a common carrier was not and could not be terminated by defendants depositing said goods in its freight depot building or warehouse on the said 3d day of January, A. D. 1878, or any time between the date of their arrival and the date of said fire, on the 5th day of January, 1878, as alleged in the fourth clause of said answer.

Fifth. Because the destruction of said goods by fire as stated in said fifth clause of said answer, taken in connection with other facts admitted by said answer, is not sufficient in law to discharge the

23 defendant from its liability as a common carrier for the loss of said goods.

Sixth. Because the liability of the defendant, as charged in said first cause of action, could not be terminated or discharged by the failure of the plaintiff to call or send for said goods before the date of said fire, as alleged in the sixth clause of said answer.

Seventh. Because the defendant's denial pleaded in the seventh clause of said answer is a denial of a conclusion of law; because said seventh clause contains a denial of the contract of freightment, and then seeks to avoid it by suggesting a different contract without setting it out, and because the liability of the defendant as a common carrier of said goods continued while under its control and in its possession for thirty days after the date of their said arrival.

Eighth. Because the plaintiff was not bound by law to pay the defendant's charges for transporting said goods until the same were delivered to the plaintiff or his authorized agent in good order and condition, and because the defendant admits its inability to deliver the same in good order and condition.

(Signed) CHARLES & DILLON,
Att'ys for Plaintiff.

P. O. DENVER, COLORADO.

(Endorsed:) No. 141. Circuit court of United States, district of Colorado. Simon White vs. Colorado Central R. R. Co. Demurrer to answer to 1st cause of action. Filed this 2nd day of April, A. D. 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparnick, dep'ty. Charles & Dillon, att'ys for def't.

24 And the said replication to the answer to the second cause of action herein is in words and figures as follows, to wit:

Replication to answer to 2d cause of action.

In the circuit court of the United States.

STATE OF COLORADO, *ss:*

SIMON WHITE, DOING BUSINESS AS, ETC., plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, defendant.

Replication to answer to 2d cause of action.

The plaintiff replies to the defendant's answer to the second cause of action of the plaintiff:

First. That as to whether the said goods mentioned in the fifth clause of said answer were saved from said fire and not destroyed by said fire, the plaintiff has not and cannot obtain sufficient information or knowledge upon which to base a belief; but is informed and believes the truth to be that said goods were so damaged by said fire as to render them of no value whatever, and that the same are utterly worthless.

25 Second. That neither on said third day of January, A. D. 1878, nor on any other day, was it ever agreed and understood between the plaintiff and defendant that while the said goods were in the said depot building they were there at the risk of the plaintiff and not at the risk of the defendant, as alleged in the sixth clause of said answer.

(Signed) CHARLES & DILLON,
Att'ys for Plaintiff.

STATE OF COLORADO, *ss:*

Before me, the undersigned, Edward F. Bishop, clerk of the circuit court of the United States within and for the district of Colorado, this day appeared Henry C. Dillon, who, having been by me first duly sworn, on oath says: I am the plaintiff's agent and attorney. The plaintiff does not reside in the said State of Colorado. I am familiar with the facts contained in the foregoing replication, and have heard the same read and understand the meaning thereof; and the matters therein stated are true, to the best of my own knowledge and belief, except as to those matters stated on information and belief, and that as to those I believe them to be true.

(Signed) HENRY C. DILLON.

Sworn to and subscribed before me this 2d day of March, A. D. 1878.
[CIR. COURT SEAL.] (Signed) EDWARD F. BISHOP,
Clerk.

26 (Endorsed:) No. 141. Circuit court of the United States. Simon White, etc., vs. Colorado Central R. R. Co. Replication to answer to 2nd cause of action. Filed this 2nd day April, A. D. 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparnick, dep'ty. Charles & Dillon, pl'ff's att'y.

And afterwards and on, to wit, the 27th day of May, A. D. 1878, came again the said plaintiff, by H. C. Dillon, esq., his attorney, and filed in said court and in said cause a notice of the death of the said plaintiff; and the said notice is in words and figures as follows, to wit:

Notice of death of plaintiff.

In the circuit court of the United States for the district of Colorado.

SIMON WHITE, DOING BUSINESS AS S. WHITE & Co., plaintiff,
v.
COLORADO CENTRAL RAILROAD COMPANY, DEFENDANT.

Notice of death of plaintiff.

To the above named defendant or to A. H. De France or Willard
27 Teller, esquires, its attorneys:

GENTLEMEN: Please take notice that on Monday, the 3d day of June next, at chambers of said court, in the city of Denver and State of Colorado, at the hour of ten o'clock a. m. of that day, or as soon thereafter as counsel can be heard, we shall suggest the death of the plaintiff and move the court to revive and continue said action in the name of Asher A. White, administrator of the said Simon White, deceased, as plaintiff.

Denver, Colorado, May 27th, A. D. 1878.

Respectfully, yours,
(Signed) CHARLES & DILLON,
Att'ys for Administrator.

Received a copy of above notice this 27th day of May, A. D. 1878.
(Signed) H. M. & WILLARD TELLER,
Att'y for Defendant.

(Endorsed:) 141. U. S. circuit court district of Colorado. Simon White v. Colorado Central Railroad Company. Notice of death of plaintiff, &c. Filed May 27, A. D. 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparnick, dep'ty. Charles & Dillon, att'ys adm., Denver, Colo.

28 And afterwards, and on, to wit, the 12th day of June, A. D. 1878, and in vacation preceding the July term, A. D. 1878, of said court at chambers, present the honorable Moses Hallett, district judge, the following order was had and entered of record in said court and in said cause, to wit:

Order, suit revived, administrator plaintiff.

SIMON WHITE, DOING BUSINESS UNDER THE firm name and style of S. White & Co.,
vs.
COLORADO CENTRAL RAILROAD COMPANY. } 141.

Order, suit revived, administrator as plaintiff.

And now on this day comes Asher A. White, administrator of the estate of the said Simon White, plaintiff, by John Q. Charles and Henry

C. Dillon, his attorneys, and suggest to the court the death of the said plaintiff, and moves the court to substitute the said Asher A. White, administrator as aforesaid, as plaintiff in the stead of the said Simon White, deceased.

And the court being sufficiently advised in the premises, and it appearing to the court that the said Asher A. White has been duly appointed administrator as aforesaid, and the said defendant consenting to this order, it is ordered by the court that the said action be revived, and that the said Asher A. White, administrator, be substituted in said action as plaintiff in the place and stead of the said Simon White, deceased.

And afterwards, and on, to wit, the 8th day of July, A. D. 1878, the same being one of the regular judicial days of the July term, A. D. 1878, present the honorable John F. Dillon, circuit judge of said circuit, and the honorable Moses Hallett, district judge of said district, the following proceedings were had and entered of record in said court and in said cause, to wit:

Order, demurrer to answer overruled.

ASHER A. WHITE, ADMINISTRATOR,
vs.
THE COLORADO CENTRAL RAILROAD CO. } 141. Action for damages.

Order, demurrer to answer overruled.

At this day comes the said plaintiff, by Henry C. Dillon, esq., and the said defendant, by A. H. De France, esq., its attorney, also comes.

And the demurrer of the said plaintiff to the answer of the said defendant to the first cause of complaint herein having heretofore come on to be heard, and having been argued by counsel, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said answer to the first cause of action as aforesaid is sufficient in law.

30 And afterward and on, to wit, the 12th day of July, A. D. 1878, came again the said plaintiff, by Henry C. Dillon, esq., his attorney, and filed in said court and in said cause his replication to the answer of the said defendant to the first cause of action herein, and the said replication is in words and figures as follows, to wit:

Replication to answer to 1st cause of action.

In the circuit court of the United States within and for the district of Colorado, of the July term, A. D. 1878.

Replication to answer to 1st cause of action.

ASHER A. WHITE, ADMINISTRATOR OF SIMON White, deceased, plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, defendant.

And now on this day comes the plaintiff, by John Q. Charles and H.

C. Dillon, his attorneys, and replies to the said answer of the defendant to the plaintiff's first cause of action in the said complaint mentioned:

I. That he is informed and believes, and therefore charges the fact to be, that the defendant did not arrive with the said cases, trunks, and forms, at Denver aforesaid, on the morning of the third of January, A. D. 1878.

31 II. He denies that on the day and at the place last aforesaid the *the* said Simon White had due notice, or any notice whatever, of the arrival of said goods at Denver aforesaid.

III. He avers that a duly authorized agent of the said Simon White was at Denver and at the freight depot aforesaid after the alleged arrival of said goods at Denver aforesaid, and before the happening of the said fire, ready to pay the defendant's charges thereon and receive the said goods, if he or the said Simon White had known of the arrival of the said goods, of all which the said defendant had notice.

IV. He denies that the defendant waited a reasonable time upon the said Simon White or his authorized agent to call for and receive the said goods or take them away before unloading and depositing them in its freight depot or warehouse, on the said third day of January, A. D. 1878, and denies that the said Simon White had any notice whatever of the unloading and depositing of the said goods as in the 4th clause of said answer is alleged.

V. He alleges that after the said supposed arrival of said goods on the said third day of January, A. D. 1878, and before the happening of the said fire, an authorized agent of the said Simon White did call for the said goods and request a delivery of the same of and from the said defendants.

VI. He denies that the said contract of affreightment in said complaint mentioned contained any exception or condition that the

32 said Simon White or his authorized agent should be there at its said freght depot ready to receive the said goods upon their arrival at Denver aforesaid; nor did the said Simon White agree to and with the defendant at any time that he or his authorized agent would be at Denver aforesaid ready to receive the said goods upon their arrival in Denver aforesaid.

VII. He denies that the said Simon White has not offered to pay the defendant's reasonable charges for the carriage of the said goods, or any part thereof; and on the contrary avers, that after the happening of the said fire, and on, to wit, the second day of February, A. D. 1878, the said Simon White demanded the said goods of and from the defendant and tendered to it, at Denver aforesaid, its said freight charges thereon, and the defendant then and there refused to deliver the same to the said Simon White or his authorized agent.

(Signed) J. Q. CHARLES,
(Signed) H. C. DILLON,
Att'ys for Pl'ff.

(Indorsed:) No. 141. Circuit court of the U. S. Asher A. White vs. Colorado Central Railroad Co. Replication to answer to 1st cause. Filed July 12, A. D. 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparnick, dep'ty. Charles & Dillon, att'ys pl'ff., Denver, Col.

33 And afterwards, and on, to wit, the 27th day of June, A. D. 1878, came again the said plaintiff by H. C. Dillon, esq., his attorney, and sued out of said court and in said cause a dedimus potestatum with interrogatories attached thereto.

And afterwards, and on, to wit, the 1st day of July, A. D. 1878, came again the said plaintiff by H. C. Dillon, esq., his attorney, and sued out of said court and in said cause a certain other dedimus potestatum, with interrogatories attached thereto.

And afterwards, and on, to wit, the 16th day of July, A. D. 1878, came again the said plaintiff by H. C. Dillon, esq., his attorney, and filed in said court and in said cause a certain stipulation to open depositions, and thereupon the depositions of Samuel Strausse, Samuel Cline, and Joseph Behue were by the clerk opened, published and filed in said court and in said cause, and the said stipulation is in words and figures as follows, to wit:

Stipulation to open depositions.

In circuit court of the United States, eighth circuit, district and State of Colorado.

ASHER WHITE
vs.
34 COLORADO CENTRAL RAILROAD COMPANY.

Stipulation to open depositions.

It is hereby stipulated that the depositions now on file in the above entitled cause may be opened and published at once.

(Signed) CHARLES & DILLON,
Att'ys for P'ff.
H. M. & WILLARD TELLER.
Att'ys for Def't.

(Endorsed:) 141. In circuit court. Asher White vs. Colorado Central R. R. Co. Stipulation to open depositions now in office. Filed July 16th, A. D. 1878. (Signed) Edward F. Bishop, clerk.

And the said deposition of Samuel Cline is in words and figures as follows, to wit:

35 *Deposition of Samuel Cline.*

The deposition of Samuel Cline, of Newburyport, in the county of Essex, and State of Massachusetts, a witness of lawful age, produced, sworn, and examined upon his corporal oath, on the eighth day of July, A. D. 1878, at the office of Stephen Collins, in the city of Newburyport, in the county of Essex, and State aforesaid, by me Stephen Collins, a notary public, duly appointed by a dedimus potestatum, issued out of the clerk's office of the circuit court of the U. S. for the district of Colorado, bearing test in the name of Edward F. Bishop, clerk of the said court, and the seal of the said court affixed thereto and to me directed as such notary public, for the examination of the said Samuel Cline, witness in a certain suit and matter in controversy now pending and undetermined in the said circuit court, wherein Asher A. White, ad'r of Simon White, deceased, is plaintiff, and the Colorado Central Railroad Company is defendant, in behalf of the said Asher A. White, administrator as aforesaid, as well *as* on the cross-interrogatories of the Colorado Central Railroad Company as on the interrogatories of the plaintiff, which were attached to or included with the said commission, and upon none others.

36 The said CLINE, being first duly sworn by me as a witness in

the said cause, previous to the commencement of his examination, to testify the truth, as well on the part of the plaintiff as the defendant, in relation to the matter in controversy between the said plaintiff and defendant, so far as he should be interrogated, testified and deposed as follows:

Answer to int. 1st. My name is Samuel Cline; am 42 y'rs old; my occupation, salesman; my place of residence, Newburyport, Mass.

Answer to int. 2nd. I know the plaintiff; have known him twenty years.

Answer to int. 3rd. In December, A. D. 1877, I lived in Georgetown, Colorado, and in January, A. D. 1878, I lived in Denver, Colorado. I was selling goods for Simon White & Co., while in Georgetown, and was in the employ of the said Simon White & Co. while living in Denver at the above date.

Answer to int. 4th. I was acquainted with the said Simon White in his lifetime. In the months of December and January aforesaid, I was selling goods for the said White & Co.

Answer to int. 5th. In the years A. D. 1877 and 1878, prior to
37 his death, the said Simon White resided in the city of Boston, in the county of Suffolk, State of Massachusetts, and was engaged in buying and selling goods.

Ans. to int. 6th. The said Simon White did carry on business in said Georgetown, State of Colorado, selling ready-made clothing, hats, caps, boots and shoes, trnnks and gentlemen's furnishing goods, under the name of S. White & Co. The business at that time was managed by Samuel White and myself.

Ans. to int. 7th. I did assist in shipping merchandise for the said Simon White & Co., by the Colorado Central Railroad, in the month of January last aforesaid to Denver, in said State of Colorado; it consisted of ready-made clothing, hats, caps, boots and shoes, trunks and valises and gentlemen's furnishing goods in general, to the amount of eight thousand four hundred and forty dollars and thirty-nine cents, this being the cost of said goods, including the freight to said Georgetown; their value in trade would be twenty-five per cent. advance on the above sum.

Ans. to int. 8th. I have had about twenty years' experience in selling the above named class of goods.

38 Ans. to int. 9th. Samuel White and Joseph Behue, "a carpenter," assisted in packing and shipping the merchandise at that time.

Ans. to int. 8th. I cannot say when said merchandise arrived in Denver.

Ans. to int. 11th. The said Simon White & Co. did not receive any notice from defendant of the arrival of said merchandise in said Denver.

Ans. to int. 12th. I did inquire on the 3rd day of January, 1878, and again on the day following about noon, Samuel White being with me at the time, and we were told to go out into the freight-house and see the boys about it; saw one of the men, and asked him, and he said he thought they had arrived. I did not see any of the goods.

Ans. to int. 13th. The fifth day of January I heard that the depot had burned. I went up there and was told by some person in the office that the goods were burned in the depot.

Ans. to int. 14th. When I was told by one of the men on Friday noon, the fourth day of January, that he thought the goods had arrived,
39 I set about to get a team to take them away; could not engage

a team to do the job that day; the next morning, before working hours, the depot burned.

Ans. to int. 15th. The goods were burned while in the possession of the defendants.

Ans. to int. 16th. The morning after the depot burned I went up there to see what damage was done by the fire; I saw a pile of part burned goods all mixed up, did not consider them worth anything except for rags, value of about twenty-five dollars.

Ans. to int. 17th. Yes; Mr. Samuel White had money in hand and in my presence offered to pay charges for carrying said goods from Georgetown to Denver, provided they delivered the same goods which they took from Georgetown in as good condition as said goods were in when they were shipped in Georgetown. Previous to this offer of said White he, the said White, received a notice from Mr. Phelps, freight agent, for him, said White, to call at the depot, as he wanted to see him on business. Samuel White and myself went up there and saw Mr. Phelps, said freight agent, and asked him what he wanted? He said he had a freight bill against Simon White & Co. for carrying thirty-three cases of merchandise,
40 three trunks, and two frames; amount of freight bill was about forty-nine dollars; said White then and there offered to pay said freight bill provided said freight agent would deliver the goods to him the said White; said Phelps, freight agent, replied, "We have not got the goods"; we asked him what had become of the goods, and he said they were burned; Samuel White then said, if you have not got the goods I shall not pay the freight bill.

Ans. to int. lastly. I do not think of anything more in answer to this int. except that I can and do swear that every article named in the invoice was packed in those boxes and shipped to Denver on the Colorado Central Railroad at Georgetown, and every article in the invoice was marked at the cost price in the East, including freights.

Ans. to cross-int. 1st. I knew the said Simon White in the city of Boston, Mass., in December, A. D. 1877; said White then resided in said Boston, and in January, A. D. 1878, said White resided in said Boston; said White resided in said Boston twenty-five years or thereabouts.

Ans. to cross-int. 2nd. Said Simon White was a married man and had a family, and they were in Boston and keeping house there in December, 1877, and January, 1878.

41 Ans. to cross-int. 3rd. I saw the said Simon White two days before he died at his home in the city of Boston; I think it was on the 18th day of February, 1878.

Ans. to cross-int. 4th. Said White did not reside in Denver and had no store in Denver in December, 1877, nor in January, 1878.

Ans. to cross-int. 5th. The kind of goods shipped were hats, caps, boots, shoes, ready-made clothing, and gents' furnishing goods, first class, mostly new and fashionable, both coarse and fine, mostly fine; had no second hand goods, had no poor or damaged goods, had no unsalable goods, had no goods out of style, or damaged in any way. To enumerate the goods I shall be obliged to refer you to the invoice.

Ans. to cross-int. 6th. Some of the goods were purchased of Prager, Buck & Co., of Boston, Mass., some of Rouse and Ripley of Boston, Mass., some of Weil & Dreifoot of Boston; also purchased from other houses; do not remember the names.

Ans. to cross-int. 7th. The goods were arriving in said Georgetown at different times, cannot give the particular times; they were offered
42 for sale in said Georgetown and we continued selling about

eight months. The goods were sent to Denver to stock a store in said Denver.

Ans. to cross-int. 8th. Said Simon White & Co. had in their employ Samuel White and myself as their agents in Denver; we were in Denver waiting the arrival of the goods; we arrived in Denver on the 2nd day of January, 1878, as near as I can recollect, and were there about one month in said Simon White & Co.'s employ; had not opened any store; there was no sign in Denver indicating that any person or persons were employed by said Simon White & Co.; I know that there was no notice sent to Simon White & Co. of the arrival of the said goods in Denver from the fact that the said White & Co. had a box in the said Denver post-office, and any letters or communications addressed to said White & Co., Denver, would come through that box and could not fail to reach us.

Ans. to cross-int. 9th. Inquiry was made by me on January 3rd, 1878, at the freight office in said Denver if the goods had arrived; there being several persons present I could not tell who answer' no; some one
43 in the office did answer no; I said nothing more, I left the office and went away; the last inquiry I made about the arrival of the goods, "previous to the fire," was on the 4th day of January, 1878, Samuel White being with me at the time, and we were told to step into the freight-house and see some of the boys; we met one of the men and asked him about the goods; he said he did not know, but he thought they had arrived.

Ans. to cross-int. 10th. In reply to this int. as I understand it, we did make, or Samuel White did make a demand on Mr. Babcock, gen. freight agent, for the goods or their value in money.

Ans. to int. 11th. The goods I saw after the fire were lying in a pile, a mixed lot; they looked like a pile of half burnt rags; think they might be worth the price of old rags; they were piled on the platform or floor of the depot, could not say positively which, on the day of the fire.

Ans. to cross-int. 12th. I have no interest in the event of this
44 suit nor in the proceeds to be derived therefrom. I never had any interest in the goods.

(Signed) SAMUEL CLINE.

Certificate by commissioner.

Certificate.

I, Stephen Collins, of Newburyport, in the county of Essex and State of Massachusetts, a notary public duly appointed to take the deposition of the said Samuel Cline, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Cline as a witness in the said suit between the said Asher A. White, administrator as aforesaid as plaintiff, and the Colorado Central Railroad Company as defendant, he, the said Samuel Cline, was duly sworn by me to testify the truth in relation to the matter in controversy between the said parties, so far as he should be interrogated concerning the same. That the said deposition was taken by me and reduced to writing by me at my office in the city of Newburyport, in the county of Essex, and State of Massachusetts, on the eighth day of July, A. D. 1878, and that after said deposition was taken by me as aforesaid, the interrogatories and answers
45 thereto, as written down, were read over to the said witness, and

that thereupon the same was signed and sworn to by the said deponent, Samuel Cline, before me, at the place and on the day and year last aforesaid.

[NOTARIAL SEAL.] (Signed) STEPHEN COLLINS.
Notary Public.

NEWBURYPORT, MASS., *July 8th*, 1878.

Received of the plaintiff twenty-five dollars, for taking deposition as above.

STEPHEN COLLINS,
Notary Public.

Authentication.

COMMONWEALTH OF MASSACHUSETTS,
Secretary's Department:

BOSTON, *July 8th*, 1878.

I hereby certify that on the 18th day of January, 1878, Stephen Collins was appointed and commissioned, and on the 22nd day of January, 1878, duly received the qualifying oaths thereunder, as a notary public for the county of Essex in the said commonwealth, for the term of seven years from the date of said commission, and that to his acts and attes-
46 tations as such, full faith and credit are and ought to be given, in and out of court.

In testimony of which I have hereunto affixed the seal of the commonwealth.

[STATE SEAL.] (Signed) HENRY B. PIERCE,
Secretary of the Commonwealth.

And the said dedimus potestatum attached to the foregoing deposition is in words and figures as follows, to wit:

47 *Dedimus potestatum.*

U. S. circuit court, Colo.

THE UNITED STATES OF AMERICA:

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States of America to C. Osgood Morse, esq., a notary public, or to any notary public residing at Newburyport, in the county of Essex and State of Massachusetts, greeting:

Whereas it has been represented that Samuel Cline a material witness in a certain cause now pending in the circuit court of the United States for the district of Colorado, wherein Asher A. White, administrator of Simon White, deceased, is plaintiff, and Colorado Central Railroad Company is defendant, and that the said witness resides at Newburyport aforesaid, without the said district of Colorado, and that his personal attendance cannot be procured at the trial of the said cause:

Now, know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority as commissioner, to examine the said witness; and you are therefore authorized and required to cause the said witness to come before you at such times and place as you may therefor designate

and appoint, and diligently to examine the said witness on the oath or affirmation of the said witness by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories and cross-interrogatories attached to these presents on the part of the said plaintiff, and none other; and the same, when thus taken, together with this commission and the said interrogatories, to certify into our said circuit court, in a sealed envelope, with the least possible delay.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in the district aforesaid, this 27th day of June, A. D. 1878, and of the Independence of the United States the 102nd year.

EDWARD F. BISHOP, *Clerk*,
By , *Deputy Clerk*.

Fees before commissioner, $, paid by .

Instructions as to the mode of taking, certifying, and returning depositions.

I. CAPTION OF THE DEPOSITION.

The deposition of , of the county of and State [or Territory] of , a witness of lawful age, produced, sworn, and examined upon his corporal oath, on the day of , A. D. 187 , at the office [or house] of , in the town [or city] of , in the county of and State (or Territory) aforesaid, by me, , a commissioner [or by us, if more than one commissioner, inserting all the names of the commissioners] duly appointed by a dedimus potestatum, issued out of the clerk's office of the circuit court of the United States for the district of Colorado, bearing teste in the name of the Chief Justice of the United States, and the seal of said court affixed thereto, and to me [or us, if more than one] directed as such commissioner [or commissioners], for the examination of the said , witness in a certain suit and matter in controversy, now pending and undetermined, in the said circuit court, wherein is plaintiff and is defendant [insert the names of the parties litigant], in behalf of the said [plaintiff or defendant, as the case may be], as well as on the cross-interrogatories of the as upon the interrogatories of the , which were attached to the said commission, and upon none others, the said being first duly sworn by me [or by], one of the said commissioners [if more than one], as a witness in the said cause previous to the commencement of his examination to testify the truth, as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and defendant so far as he shall be interrogated, testified and deposed as follows:

Interrogatory first. [Here insert the first interrogatory in full.]

Answer. [Here insert the answer] and so on successively in the order in which the interrogatories may be propounded and answered; then follow the cross-interrogatories [if any], and answers thereto by the witness on the part of the defendant [or plaintiff, as the case may be]. Here again write down cross-interrogatories and answers successively, in the order aforesaid.

After the deposition is taken, the interrogatories and answers should be read over to the witness, and if he assent to the truth of the answers as written down, the witness will then sign his name to the bottom of his deposition, and swear to the truth of it before the commissioner.

CERTIFICATE.

[The commissioner should then certify as to the time, place, and manner of taking deposition, as follows:]

"I , of the county of and State [or Territory] of , a commissioner duly appointed to take the deposition of the said , a witness [or witnesses], whose name is subscribed to the foregoing deposition, do hereby certify that, previous to the commencement of the examination of the said as a witness in the said suit between the said , as plaintiff, and , as defendant, he was duly sworn by me [or by], one of said commissioners [if more than one], to testify the truth in relation to the matters in controversy between the said parties, so far as he should be interrogated concerning the same; that the said depositions were taken by , and reduced to writing by [naming the person], at my office [or at the house of], in the city [or town] of , in the county of and State [or Territory] of , on the day of , A. D. 187 ; and that after said deposition was taken by me [or us] as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witness [or witnesses], and that thereupon the same was signed and sworn to by the said deponent [naming him or them], before me [or us] at the place, on the day and year last aforesaid.

(Signed) , *Commissioner.*

The foregoing certificate of commissioner should be at the foot or bottom of the deposition, immediately following the deposition of the witness, and should be followed by a certificate from the proper court or officer of the State, showing official character and authority of the commissioner.

The commissioner should then attach the said deposition to this commission and interrogatories, and also the exhibits, if any, properly marked or lettered as "Exhibit A," etc., and enclose the whole in a suitable wrapper or envelope, and then seal up the same securely with three seals, writing his name tra'vers'ly across the middle seal or fold.

The commissioner will also endorse tra'versely across one end of the package thus sealed up, the names of the parties to this suit, and address by mail to the proper address of the clerk issuing the commission, as follows, to wit:

(Indorsed:) ✻ 141. A. B., plaintiff, vs. C. D., defendant. In the circuit court U. S. for the district of Colorado. Deposition of witness, taken on the part of the plaintiff (or defendent). To Edward F. Bishop, esq., clerk of the circuit court of the United States, Denver, Colorado.

Neither of the parties to the suit, or their attorneys or agents, or any person at all interested in the event of the suit are permitted to draw, write, or dictate any part of the deposition required to be taken as aforesaid.

To enforce attendance of witnesses, see U. S. Revised Statutes, § 868, 869, 870.

One caption will answer for the deposition of several witnesses where they are all taken at the same time and place, to be read as evidence in the same suit, by so modifying the form above given as to be applicable to the number of witnesses examined.

Should an adjournment be necessary before the depositions are all completed, the commissioner will note the same.

Care should be taken to attach such depositions, commission, inter-

rogatories, answers, and exhibits firmly together, by means of tape or ribbon, and using wax, wafers, or eyelets when necessary.

☞ The commissioner will note the amount of his fees, and whether paid or unpaid.

48 *Stipulation attached to deposition of Cline.*

In the circuit of the United States for the district of Colorado, to July term, A. D. 1878.

ASHER A. WHITE, ADMINISTRATOR OF SIMON White, deceased, plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, defendant.

It is hereby agreed by the parties aforesaid, through their undersigned attorneys, that the plaintiff may add to his direct interrogatories, to be attached to the dedimus about to be issued to take the deposition of Samuel Cline, the following:

"Lastly. Do you know of any other matter or thing of benefit or advantage to the plaintiff touching the matters in controversy in this suit in addition to what you have already stated? If yea, state the same as fully as if thereto particularly interrogated."

And that the defendant may also add to his cross-interrogatories on file, to be attached to said dedimus, such other cross-interrogatories as he may see fit at any time before the issuing of said dedimus.

Denver, Col., June 26th, 1878.

(Signed) CHARLES & DILLON,
Att'ys for Pl'ff.

49 " WILLARD TELLER,
Att'ys for Def't.

(Endorsed:) No. 141. In the U. S. circuit court. Asher A. White, administrator, etc., vs. Colorado Central Railroad Company. Stipulation. Filed June 26th, A. D. 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparnick, deputy.

Notice attached to deposition of Cline.

In the circuit court of the United States for the district of Colorado.

ASHER A. WHITE, ADMINISTRATOR OF SIMON White, deceased, plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, defendant.

To the said defendant, or to Willard Teller, esq., its attorney:

50 SIR: Please take notice that on Thursday, the 27th day of June, A. D. 1878, the plaintiff will sue out from the clerk's office of the said court a dedimus potestatum pursuant to the statute and rules of said court, to take the deposition of Samuel Cline, residing in the town of Newburyport, in the county of Essex and State of Massachusetts, to be read in evidence on the part of the plaintiff on the trial of this cause.

The interrogatories to be propounded to the said Samuel Cline in this

behalf on the part of the plaintiff are hereto subjoined, and you can file cross-interrogatories, and join in such dedimus, if you shall see fit to do so.

Denver, Colorado, June 22nd, 1878.

(Signed) CHARLES & DILLON,
Att'ys for Plaintiff.

Interrogatories to Samuel Cline.

In the circuit court of the United States for the district of Colorado.

ASHER A. WHITE, ADMINISTRATOR OF SIMON White, deceased, plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, defendant.

51 Interrogatories attached to depo. of Cline.

Interrogatories to be propounded to Samuel Cline, a witness to be produced, sworn, and examined in this behalf on the part of the plaintiff, by virtue of a dedimus potestatum to be issued pursuant to the foregoing notice.

Int. 1. What is your name, age, occupation, and place of residence?

Int. 2. Do you know the parties, plaintiff and defendant, in this action, or either of them? If yea, how long have you known them respectively?

Int. 3. Where were you living in December, A. D. 1877, and in January, A. D. 1878, and in what business were you then engaged?

Int. 4. Were you acquainted with the said Simon White in his lifetime? If yea, did you have any business relations with him in the said months of December and January? and state the nature of the same.

Int. 5. Where did the said Simon White reside in A. D. 1877
52 and 1878, prior to his death, and in what business was he engaged?

Int. 6. Did the said Simon White in his lifetime carry on any business in Georgetown, in the said State of Colorado? If yea, what was the nature of that business, under what name and style was it conducted, and by whom was it personally managed?

Int. 7. Did you assist in the shipping of any merchandise of the said Simon White by the defendant's railway from Georgetown aforesaid to Denver, in said State of Colorado, in the month of January last? If yea, please state in detail what merchandise you so shipped, and the value of the same at the time of shipment.

Int. 8. What experience have you had in buying and selling merchandise of the kind so shipped as aforesaid?

Int. 9. Who, if anybody, assisted you in packing and shipping the merchandise aforesaid?

Int. 10. When, if at any time after their shipment, did said merchandise arrive in Denver aforesaid?

Int. 11. Did the said Simon White, or any one in his behalf,
53 receive any notice from the defendant, of the arrival of said merchandise in Denver aforesaid?

Int. 12. After the shipment of said merchandise as aforesaid, did you inquire of the defendant if it had arrived in Denver; if yea, when and how often?

Int. 13. When, and how did you first become aware of the arrival of said merchandise at the defendant's depot in Denver?

Int. 14. If you learned of the arrival of said merchandise as aforesaid, what efforts were made on behalf of the said Simon White to remove the same from defendant's possession?

Int. 15. What afterwards became of said merchandise while in the defendant's possession?

Int. 16. If in answer to the said fifteenth interrogatory you say said merchandise was destroyed by fire while in the defendant's possession, please state what part, if any, of said merchandise was saved from the fire, and of what value the part so saved was after the said fire.

Int. 17. Did the said Simon White, or any one in his behalf, pay or offer to pay to the defendant, charges for carrying said merchan-
54 dise from Georgetown to Denver aforesaid? if yea, when, and state all you know about it.

Lastly. Do you know of any other matter or thing of benefit or advantage to the plaintiff, touching the matters in controversy in this suit, in addition to what you have already stated? if yea, state the same as fully as if thereto specially interrogated.

(Signed) CHARLES & DILLON,
Att'ys for Pl'ff.

Received a copy of the above notice and interrogatories, this 22nd day of June, A. D. 1878.

(Signed) WILLARD TELLER,
Att'y for Def't.

(Endorsed:) No. 141. In the U. S. circuit court. Asher A. White, administrator, etc., vs. Colorado Central Railroad Company. Notice of dedimus and interrogatories to Samuel Cline. Filed June 22nd, A. D. 1878. (Signed) Edward F. Bishop, clerk; Charles & Dillon, att'ys for pl'ff.

55 *Cross-interrogatories.*

In the circuit court of the United States for the district of Colorado.

ASHER A. WHITE, ADMINISTRATOR OF SIMON WHITE, deceased,
vs.
COLORADO CENTRAL RAILROAD COMPANY.

X interrogatories to Sam' Cline.

Cross-interrogatories to be propounded to Samuel Cline.

Cross-int. 1st. If you say you were acquainted with Simon White in his lifetime, state particularly when you knew him; where did he reside in December, 1877, and how long had he resided there, and where did he reside in January, 1878, if you know.

Cross-int. 2nd. Was or was not the said White a married man? And if he had a family, state where his family were in Dec., 1877, & January, 1878; and state whether said Simon White boarded or kept house.

3rd. State when you last saw Simon White, and where you
56 saw him.

4th. If you say that Simon White, in Dec., 1877, or Jan., 1878, resided in Denver, state on what street and number, and how long he had resided there, and state whether he was or was not engaged in business in Denver, and if so for how long had he been in business.

5th. If, in answer to the 7th interrogatory, you say you did assist in shipping any goods, &c., state fully and particularly the kind and quality of the goods so shipped, whether they were new and fashionable goods or were otherwise, whether they were coarse or fine, whether they were or were not second-hand goods or poor goods, or damaged goods, or were unsalable goods, or whether they were goods that were difficult of sale on account of being out of style or damaged in any way, and enumerate the number and kind of goods as nearly as you can.

6th. State if you know from whom the goods were purchased by the said White, and state what White said as to from whom he purchased the same.

57 7th. State, if you know, when these goods were received in Georgetown, and state whether they were or were not offered for sale at Georgetown, for how long, and state, if you know, why the goods were sent to Denver, if they ever were sent.

8th. If, in answer to the 11th int'y, you say anything about notice, state whether, to your knowledge, said White had any person in his employ in Denver, and if so state who and where he was employed and at what employed, and how long he had been employed, and whether there was any sign or other notice indicating that the person so employed was in the employ of White, and if so what and when such sign or notice was put up, and state fully how you knew that notice was or was not sent.

9th. If you say you ever inquired *as* these goods, state when the inquiry was first made, and where and of whom, and also state, particularly, all that you said on that occasion, and all that was said by the person of whom you inquired, and the date of your last inquiry.

58 10th. If you answer that any efforts were made by White as to the recovery of the goods, state, particularly and specially, how you know what efforts were made and who made them.

11th. If you say any of the goods were saved from the fire state what kind of goods were saved and whether the goods saved were an average lot of the goods; how much was saved, and how you know the value of the goods so saved, and whether you ever saw the goods after the fire, and if so when and where.

12th. Have you any interest in the event of this suit, or in the proceeds to be derived therefrom, or had you any interest in the goods?

(Signed) H. M. & WILLARD TELLER,
Att'ys for Def't.

(Endorsed:) Asher White vs. Colorado Central Railroad Company. Cross-interrogatories.

59 The foregoing papers endorsed: 141. Circuit court U. S., Asher A. White, admin'r Simon White vs. Colorado Central R. R. Co. Deposition Samuel Cline on part of plaintiff. Opened, published and filed July 16th, A. D. 1878. (Signed) Edward F. Bishop, clerk. Filed June 22, A. D. 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparnick, deputy.

H. M. & Willard Teller for defendant.

And the said depositions of Samuel Strauss and Joseph Behm are in words and figures as follows, to wit:

DEPOSITIONS OF STRAUSS AND BEHM.

60 *Dedimus potestatum.*

U. S. circuit court, Colo.

THE UNITED STATES OF AMERICA:

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States of America to William T. Hughes, esq., a notary public, residing at Georgetown, in the county of Clear Creek and State of Colorado, greeting:

Whereas it has been represented that Samuel Strausse and Joseph Behm are material witnesses in a certain cause now pending in the circuit court of the United States, for the district of Colorado, wherein Asher A. White, administrator of Simon White, deceased, is plaintiff, and Colorado Central Railroad Company is defendant, and that the said witnesses reside at Georgetown aforesaid, within the said district of Colorado, and that their personal attendance cannot be procured at the trial of the said cause:

Now, know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority as commissioner, to examine the said witnesses, and you are therefore authorized and required to cause the said witnesses to come before you, at such times and place as you may therefor designate and appoint, and diligently to examine the said witnesses on the oath or affirmation of the said witness by you first duly in that behalf administered, and faithfully to take the deposition of the said witnesses upon all interrogatories and cross-interrogatories attached to these presents, on the part of the said plaintiff, and none other; and the same, when thus taken, together with this commission and the said interrogatories, to certify into our said district court, in a sealed envelope, with the least possible delay.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in the district aforesaid, this 1st day of July, A. D. 1878, and of the Independence of the United States the 102nd year.

(Signed) EDWARD F. BISHOP, *Clerk*,
By , *Deputy Clerk.*

Fees before commissioner: To taking dep., $7.00; S. Strausse, 1 d'y, $2.50; Jos. Behm, 1 d'y, $2.50—$12.00; paid by pl'ff.

61 *Instructions as to the mode of taking, certifying, and returning depositions.*

I. CAPTION OF THE DEPOSITION.

The deposition of , of the county of and State [or Territory] of , a witness of lawful age, produced, sworn and examined, upon his corporal oath, on the day of , A. D. 187 , at the office [or house] of , in the town [or city] of , in the county of and State [or Territory] aforesaid, by me, , a commissioner [or by us, if more than one commissioner, inserting all the names of the commissioners] duly appointed by a dedimus potestatum, issued out of the clerk's office of the circuit court of

the United States for the district of Colorado, bearing teste in the name of the Chief Justice of the United States, and the seal of said court affixed thereto, and to me [or us, if more than one] directed as such commissioner [or commissioners] for the examination of the said witness in a certain suit and matter in controversy now pending and undetermined in the said circuit court, wherein is plaintiff, and is defendant, [insert the names of the parties litigant,] in behalf of the said , [plaintiff or defendant, as the case may be,] as well *as* on the cross-interrogatories of the as upon the interrogatories of the , which were attached to the said commission, and upon none others, the said being first duly sworn by me [or by] one of the said commissioners [if more than one] as a witness in the said cause previous to the commencement of his examination to testify the truth, as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and defendant, so far as he shall be interrogated, testified and deposed as follows:

Interrogatory first. [Here insert the first interrogatory in full.]

Answer. [Here insert the answer] and so on successively, in the order in which the interrogatories may be propounded and answered. Then follow the cross-interrogatories [if any], and answers thereto by the witness on the part of the defendant," [or plaintiff, as the case may be.] Here again write down "cross-interrogatories and answers," successively, in the order aforesaid.

After the deposition is taken, the interrogatories and answers should be read over to the witness, and if he assent to the truth of the answers as written down, the witness will then sign his name to the bottom of his deposition, and swear to the truth of it before the commissioner.

CERTIFICATE.

[The commissioner should then certify as to the time, place, and manner of taking deposition, as follows:]

I, , of the county of and State [or Territory] of , a commissioner duly appointed to take the deposition of the said , a witness [or witnesses] whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said , as a witness in the said suit between the said , as plaintiff, and , as defendant, he was duly sworn by me, [or by , one of said commissioners, if more than one,] to testify the truth in relation to the matters in controversy between the said parties, so far as he should be interrogated concerning the same; that the said depositions were taken by , and reduced to writing by , [naming the person,] at my office, [or at the house of ,] in the city [or town] of , in the county of and State [or Territory] of , on the day of , A. D. 187 , and that after said deposition was taken by me [or us] as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witness [or witnesses], and that thereupon the same was signed and sworn to by the said deponent , [naming him or them,] before me [or us], at the place and on the day and year last aforesaid.

(Signed) , *Commissioner.*

The foregoing certificate of commissioner should be at the foot or bottom of the deposition, immediately following the deposition of the

witness, and should be followed by a certificate from the proper court or officer of the State showing official character and authority of the commissioner.

The commissioner should then attach the said depositions to this commission and interrogatories, and also the exhibits, if any, properly marked or lettered as Exhibit A, etc., and enclose the whole in a suitable wrapper or envelope, and then seal up the same securely with three seals, writing his name tra'vers'ly across the middle seal or fold.

The commissioner will also endorse tra'versely across one end of the package thus sealed up the names of the parties to this suit, and address by mail to the proper address of the clerk issuing the commission as follows, to wit:

(Indorsed:) ℔ 141. A. B., plaintiff, vs. C. D., defendant. In the circuit court U. S. for the district of Colorado. Deposition of witness, taken on the part of the plaintiff [or defendant.] To Edward F. Bishop, esq., clerk of the circuit court of the United States, Denver, Colorado.

Neither of the parties to the suit, or their attorneys or agents, or any person at all interested in the event of the suit, are permitted to draw, write, or dictate any part of the deposition required to be taken as aforesaid.

To enforce attendance of witnesses, see U. S. Revised Statutes, § 868, 869, 870.

One caption will answer for the deposition of several witnesses, where they are all taken at the same time and place, to be read as evidence in the same suit, by so modifying the form above given as to be applicable to the number of witnesses examined.

Should an adjournment be necessary before the depositions are all completed, the commissioner will note the same.

Care should be taken to attach such depositions, commission, interrogatories, answers, and exhibits firmly together, by means of tape or ribbon, and using wax, wafers or eyelets when necessary.

☞ The commissioner will note the amount of his fees, and whether paid or unpaid.

61 *Affidavit as to materiality.*

In the circuit court of the United States for the district of Colorado.
To the July term, A. D. 1878.

ASHER A. WHITE, ADMINISTRATOR OF SIMON White, deceased, plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, defendant.

STATE OF COLORADO, *ss:*

Samuel White, being duly sworn, on oath says that Samuel Strausse and Joseph Behm are material and necessary witnesses on the part of the plaintiff in the above entitled cause, and that they reside in Georgetown, in the county of Clear Creek, and State of Colorado aforesaid, and out of the county wherein said cause will be tried.

(Signed) SAMUEL WHITE.

Sworn to and subscribed before me this 26th day of June, A. D. 1878.
[SEAL C'T C'T U. S., COL.] (Signed) EDWARD F. BISHOP,
Clerk Cir't Court U. S., Dis't of Colorado.

62 *Notice.*

In the circuit court of the United States for the district of Colorado.
In vacation before July term, A. D. 1878.

ASHER A. WHITE, ADMINISTRATOR OF SIMON WHITE, deceased, plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, defendant.

To the above named defendant and to Willard Teller, esq., its attorney:

Please take notice that on Monday, the first day of July, A. D. 1878, the plaintiff will sue out from the clerk's office of said court a dedimus potestatem pursuant to the statutes and rules of said court, to take the depositions of Joseph Behm and Samuel Srausse, residing in Georgetown, in the county of Clear Creek and State of Colorado, to be read in evidence on the part of the plaintiff on the trial of this cause. The interrogatories to be propounded to the said Joseph Behm and Samuel Strausse are hereto subjoined, and you can file cross-interroga-
63 tories and join in such dedimus if you shall see fit to do so.

Denver, Colorado, June 26th, 1878.

(Signed) CHARLES & DILLON,
Atty's for Plaintiff.

Interrogatories to Sam'l Strauss.

In the circuit court of the United States for the district of Colorado.
In vacation before July term, A. D. 1878.

ASHER A. WHITE, ADMINISTRATOR OF SIMON WHITE, deceased, plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY defendant.

Interrogatories to be propounded to Samuel Strausse aforesaid, a witness to be produced, sworn, and examined in this behalf on the part of the plaintiff by virtue of the dedimus to be issued pursuant to the foregoing notice:

Interrogatory 1. What is your name, age, occupation, and place of residence?

Int. 2. Do you know the parties, plaintiff and defendant, in this
64 cause, or either of them? If yea, how long have you known them respectively?

Int. 3. Were you acquainted with the stock of merchandise shipped by S. White and Co. over the defendant's railroad from Georgetown, in the county of Clear Creek, and State of Colorado, to Denver, in the county of Arapahoe, in said State, on the first day of January, A. D. 1878? If yea, of what kind of merchandise did said stock consist?

Int. 4. Under whose personal management was the said stock of merchandise while it was in Georgetown aforesaid?

Int. 5. How well acquainted were you with said stock of merchandise, and what experience have you had, if any, in buying and selling the same kinds of merchandise?

Int. 6. Did you see the said stock of merchandise when it was being packed for shipment to Denver as aforesaid?

Int. 7. Please state as nearly as you can from your knowledge of said stock of merchandise and the cost of such merchandise
65 delivered in Georgetown aforesaid what its value was on the said first day of January last?

Int. 8. In what condition was said stock of merchandise when shipped as aforesaid, and were the articles composing it new, second-hand, or old?

Int. 9. Do you know of any other matter or thing of benefit or advantage to the plaintiff touching the matters in controversy in this cause in addition to what you have already stated? If yea, state the same as fully as if thereto specially interrogated.

Interrogatories to be propounded to the said Joseph Behm, a witness also to be produced, sworn, and examined in this behalf on the part of the plaintiff, by virtue of the de limus potestatem aforesaid:

Interrogatory 1. What is your name, age, occupation, and place of residence?

66 Int. 2. Do you know the parties plaintiff and defendant in this cause or either of them? If yea, how long have you known them respectively?

Int. 3. Were you acquainted with the stock of merchandise kept on sale by S. White & Co. in Georgetown, in the State of Colorado, in December last? If yea, of what kinds of merchandise did it consist?

Int. 4. Was any of that stock of merchandise shipped to Denver, Colorado, over the defendant's railroad, or delivered to the defendant for shipment to Denver aforesaid on January 1st, 1878? If yea, how much of said stock?

Int. 5. If the said stock or any part thereof was so delivered to the defendant for the purpose aforesaid, who packed the same for shipment, and in what manner and in how many cases was the same packed?

Int. 6. In what condition was said merchandise when so packed for shipment as aforesaid, and was any part thereof old or second-hand goods?

67 Lastly. Do you know of any other matter or thing of benefit or advantage to the plaintiff touching the matters in controversy in this suit in addition to what you have already stated? If yea, state the same as fully as if thereto particularly interrogated.

(Signed) CHARLES & DILLON,
Att'ys for Plaintiff.

Received a copy of the above affidavit, notice, and interrogatories this 26th day of June, A. D. 1878.

(Signed) WILLARD TELLER,
Att'y for Def't.

(Endorsed:) No. 141. In the U. S. circuit court. Asher A. White, administrator, etc., vs. Colorado Central Railroad Company. Notice to take depositions of Samuel Strausse and Joseph Behm. Filed June 26, A. D. 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparnick, deputy. Charles & Dillon, atty's for pl'ff.

X. Interrogatories to Strauss.

68 In circuit court of the United States, eighth circuit, district and State of Colorado.

ASHER A. WHITE, ADMINISTRATOR OF SIMON WHITE, deceased,
vs.
COLORADO CENTRAL RAILROAD COMPANY.

Cross-interrogatories to be propounded to Samuel Strausse.

Cross-int. 1st. Did you ever see S. White & Co. have any stock of goods? If so, state fully who composed the firm of S. White & Co., and state how you know it was shipped by them, when it was shipped and by whom, how many boxes or bales, and what they contained. State how much of the stock was shipped to Central City, Colorado, how much and what part was shipped to Golden, and how much and what part was shipped to Boulder.

Cross-int. 2nd. State fully who counted and boxed the goods, how boxed and how marked, and state fully how you know, whatever
69 statement you make about it. State fully and particularly where you were when goods were packed and boxed, and whether they were shipped at the time they were boxed, or whether they did or did not remain in store for some days, & if so, with whom, and whether goods were or were not left open after packing until sent off, and state whether you saw any of them shipped or marked for shipping, and how you know what goods and how many goods were shipped to Denver.

Cross-int. 3rd. State how long S. White & Co., or Simon White, had been doing business in Georgetown, and where you first knew him, and why he sent goods away from Georgetown.

Cross-int. 4th. If you say the goods were new or second-hand, state particularly what goods and how much of the stock was new and how much second-hand. Also state particularly what kind of goods they were, whether old and out of style or new and fashionable, and whether they were or were not shop-worn, and to any considerable extent unsalable or slow of sale; and, if so, why.

70 Cross-int. 5th. If you attempt to put any value on the goods in stock that you saw in Georgetown, state particularly whether you know that the goods claimed to have been sent to Denver, for which suit is brought, were as good as the average of the stock, and state specially how you know the kind and quality of the goods in question, and how you arrive at their value.

Cross-int. 6th. State when you last saw the goods, when you last saw Simon White, and where he was residing from Dec. 20th, 1877, to Jan. 5th, 1878, and where he was during these dates.

Cross int. 7th. Did Simon White, or S. White & Co., ever do business in Denver? If so, when, for how long, where, and what kind of business?

Cross-int. 8th. If you say said White, or S. White & Co., ever did business in Denver, state who had charge of it and when he took charge thereof, and how you knew the fact of the doing business or who had charge of it.

71 Cross-int. 9th. State, if you know, to whom the goods sent Denver and other places above named were consigned; whether to White & Co., S. White & Co., or to S. White, or to whom were they consigned.

In the circuit court of the United States, eighth circuit, district and State of Colorado.

X Interrogatories to Behm.

ASHER A. WHITE, ADMINISTRATOR OF WHITE, deceased,
vs.
COLORADO CENTRAL RAILROAD COMPANY.

Cross-interrogatories to be propounded to Joseph Behm.

Cross-int. 1st. Did you ever see S. White & Co. have any stock of goods? If so, state fully who composed the firm of S. White & Co., and state how you know it was shipped by them; when it was shipped and by whom; how many boxes or bales, and what they contained. State how much of the stock was shipped to Central City, Colorado,
72 how much and what part was shipped to Golden, and how much and what part was shipped to Boulder.

Cross-int. 2nd. State fully who counted and boxed the goods; how boxed and how marked; and state fully how you know, whatever statement you make about it. State fully and particularly where you were when goods were packed and boxed, and whether they were shipped at the time they were boxed, or whether they did or did not remain in store for some days; and, if so, with whom, and whether goods were or were not left open after packing until sent off; and state whether you saw any of them shipped or marked for shipping, and how you know what goods and how many goods were shipped to Denver.

Cross-int. 3rd. State how long S. White & Co., or Simon White, had been doing business in Georgetown, and when you first knew him, and why he sent goods away from Georgetown.

73 Cross-int. 4. If you say the goods were new or second hand, state particularly what goods and how much of the stock was new and how much second-hand; also state particularly what kind of goods they were, whether old and out of style or new and fashionable, and whether they were or were not shop-work, and to any considerable extent unsaleable or slow of sale; and, if so, why.

Cross-int. 5. If you attempt to put any value on the goods in stock that you saw in Georgetown, state particularly whether you know the goods claimed to have been sent to Denver and for which suit is brought were as good as the average of the stock, and state specially how you know the kind and quality of the goods in question, and how you arrive at their value.

Cross-int. 6. State when you last saw the goods; when you last saw Simon White, and where he was residing from Dec. 20th, 1877, to January 5th, 1878, and where he was during those dates.

74 Cross-int. 7. Did Simon White, or S. White & Co., ever do business in Denver? If so, when, for how long, where, and what kind of business?

Cross int. 8. If you say said White or S. White & Co. ever did business in Denver, state who had charge of it, and when he took charge thereof, and how you know the fact of their doing business, or who had charge of it.

Cross-int. 9. State if you know to whom the goods sent to Denver and other places above named were consigned, whether to White & Co., S. White & Co., or to S. White, or to whom were they consigned?

(Endorsed:) 141. Circuit court. Asher A. White vs. Colorado Central R. R. Cross-int'g's. Filed June 27th, A. D. 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparnick, dep'ty. H. M. & Willard Teller, att'ys for def't. Denver.

75 The depositions of Samuel Strausse and Joseph Behm, both of Georgetown, of the county of Clear Creek, and State of Colorado, witnesses of lawful age, produced, sworn, and examined upon their several corporal oaths on the 2nd day of July, A. D. 1878, at the office of W. T. Hughes, a notary public in the town of Georgetown, in the county of Clear Creek, and State of Colorado aforesaid, by me, a commissioner duly appointed by a dedimus potestatum issued out of the clerk's office of the circuit court of the United States for the district of Colorado, bearing teste in the name of the Chief Justice of the United States and seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said Samuel Strausse and Joseph Behm, witnesses in a certain suit and matter in controversy now pending and undetermined in the said circuit court, wherein Asher A. White, administrator of Simon White, deceased, is plaintiff, against the Colorado Central Railroad, *is* defendant, in behalf of the said plaintiff, as well as on the cross-interrogatories of the defendant which were attached to the said commission, and upon none others.

Deposition Jos. Behm.

The said JOSEPH BEHM, being first duly sworn by me as a
76 witness in the said cause previous to the commencement of his examination, to testify the truth, as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and the said defendant, so far as he shall be interrogated, testified and deposed as follows:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer to first interrogatory. My name is Joseph Rehm; age, 31 years; my occupation is that of a carpenter and joiner; live in Georgetown, Colorado.

Int. 2. Do you know the parties plaintiff and defendant in this cause, or either of them? If yea, how long have you known them respectively?

Answer to second interrogatory. I do not know the plaintiff, except by reputation. I have learned through S. White, the reputed brother of the plaintiff's, all I know of him. As to the defendant I only know there is a railroad company by that name.

77 Int. 3. Were you acquainted with the stock of merchandise kept on sale by S. White & Company in Georgetown, in the State of Colorado, in December last? If yea, of what kind of merchandise did it consist?

Ans. to 3rd int. Yes; I was acquainted with said stock for a short time. It consisted of a general stock of clothing—of hats, caps, boots, shoes, and men's clothing generally.

Int. 4. [Erased in the original.] Under whose personal management was the said stock of merchandise while it was in Georgetown?

Ans. to 4th int. S. White and his assistant, one Kline, whose given name is unknown to me.

(By mistake the above "4th int." was propounded; hence its erasure, together with its answer.—W. T. HUGHES, *Commi'r.*)

Int. 4th. Was any of that stock of merchandise shipped to Denver,

Colorado, over the defendants' railroad, or delivered to the defendant for shipment to Denver aforesaid, on January 1st, 1878? If yea, how much of said stock?

Ans. to 4th interrogatory. I helped to pack the stock for shipment on the night of December 31st, 1877, and on the first day of January, 1878, the entire stock, together with some store-fixings, consisting of lamps, books, and show-frames and cases, were packed and shipped by delivering the same to the Colorado Central Railroad Company, at its depot in Georgetown. All the boxes were marked White and Company, Denver, Col.

Int. 5th. If the said stock, or any part thereof, was so delivered to the defendant for the purpose aforesaid, who packed the same for shipment, and in what manner and in how many cases was the same packed?

Ans. to 5th int. I am unable to state the exact number of boxes further than that there was somewhere between thirty and forty boxes. My best impression is there was thirty-three, but of this I cannot be positive, as my attention was not particularly called to the number,
77½ and I regarded my connexion with the whole matter as but temporary.

Int. 6th. In what condition was said merchandise when so packed for shipment as aforesaid? and was any part thereof old or second-hand goods?

Ans. to 6th int. The stock was all put in boxes, and in good condition for shipping; some of the boxes containing the stock were new; I made them. The entire stock was new; there was no second-hand goods amongst the stock.

Int. 7th, and lastly. Do you know of any other matter or thing of benefit or advantage to the plaintiff touching the matters in controversy in this suit, in addition to what you have already stated? If yea, state the same as fully as if thereon particularly interrogated.

Ans. to 7th & last int. My relation with the entire transaction has been stated above. I have no other knowledge touching the matter.

Cross-int. 1st. Did you ever see S. White & Co. have any stock of goods? If so, state fully who composed the firm of S. White & Company, and state how you know it was shipped by them, when it was shipped, and by whom; how many boxes or bales, and what they contained. State how much of that stock was shipped to Central City, Colorado, how much and what part was shipped to Golden, and how much and what part was shipped to Boulder.

Ans. to 1st cross int. I never saw S. White & Co. have any stock of goods, except as I stated in my direct examination. Know nothing of the composition of the firm. Don't know of any of the stock being shipped, except as I stated in my direct examination; that is, it was my understanding that the whole stock was shipped to Denver.

Cross-int. 2nd. State fully who counted and boxed the goods, how boxed and how marked; and state fully how you know, whatever statement you make about it. State fully and particularly where you was when
78 goods were packed and boxed, and whether they were shipped at the time they were boxed, or whether they did or did not remain in store for some days, and if so, with whom, and whether goods were or were not left open after packing until sent off; and state whether you saw any of them shipped or marked for shipping, and how you know what goods, and how many goods were shipped to Denver.

Ans. to cross-int. 2nd. I cannot remember who counted the boxes if it were done. Mr. White marked the goods. The goods were marked

by him S. White & Co., Denver, Col. I saw him mark the boxes; I was in the store room when he did the marking. The goods were packed and the boxes marked in the store-room. I helped to box the goods December 31st, 1877, and on January 1st, 1878, by noon, the goods were boxed, and immediately put on the transfer wagon to remove the goods to the depot. This is all I know of the boxing, marking, and shipping of the goods, excepting I saw the transfer wagon on the road from the store to the depot.

Cross-int. 3rd. State how long S. White & Co. or Simon White had been doing business in Georgetown, and when you first knew him,
79 and why he sent goods away from Georgetown.

Ans. to 3rd cross-int. If I remember rightly, 5 or 6 months. I first knew S. White about November 1st, 1877. Don't know his reasons for sending the goods from here.

Cross-int. 4th. If you say the goods were new or second-hand, state particularly what goods and how much of the stock was new and how much second-hand; also state particularly what kind of goods they were, whether old and out of style or new and fashionable, and whether they were or were not shop work, and to any considerable extent unsalable or slow of sale; and, if so, why.

Ans. to cross-int. 4th. The goods comprising the stock was new. I know nothing of styles and fashionable stocks nor the adaptation of that stock for this market, nor as to its being of slow or rapid sale.

Cross-int. 5th. If you attempt to put any value on the goods in stock that you saw in Georgetown, state particularly whether you know that the goods claimed to have been sent to Denver, and for which suit is brought, were as good as the average of the stock. And state
80 specially how you know the kind and quality of the goods in question and how you arrived at their value.

Ans. to 5th cross int. I don't know anything of the value of the stock, excepting that it was a general stock and embraced some pretty fine and some pretty common goods.

Cross-int. 6th. State when you last saw the goods, when you last saw Simon White, and where was he residing from December 20th, 1877, to January 5th, 1878, and where he was during those dates.

Ans. to 6th cross-int. I last saw the goods when on the transfer wagon; last saw Simon White on July 2nd, 1878. He was here from December 20th, 1877, to January 1st, 1878, after which I don't know where he was.

Cross-int. 7th. Did Simon White, or S. White & Co., ever do business in Denver? If so, when, for how long, where, and what kind of business?

Ans. to 7th cross-int. I don't know anything concerning those matters.

Cross-int. 8th. If you say said White or said White & Company
81 ever did business in Denver, state who had charge of it, and when he took share thereof, and how you know the fact of their doing business or who had charge of it.

Ans. to 8th cross-int. I don't know.

Cross-int. 9th. State if you know to whom the goods sent to Denver and other places above named were consigned, whether to White & Co., S. White & Co., or to S. White, or to whom were they consigned?

Ans. to 9th cross-int. My impression is that all the goods were marked alike, and were marked White & Co. or S. White & Co., I am not certain which.

(Signed) JOSEPH BEHM.

W. T. HUGHES, *Comm'r.*

Deposition of Samuel Strauss.

SAMUEL STRAUSSE, being first duly sworn, oath states:

Int. 1st. What is your name, age, occupation, and place of residence?

Ans. to 1st int. My name is Samuel Strausse; my age, 30 years;
82 I am in the dry goods and clothing business; I reside in Georgetown, Colorado.

Int. 2nd. Do you know the parties, plaintiff and defendant, in this cause, or either of them? If yea, how long have you known them respectively?

Ans. to 2nd int. I do not know Asher A. White. I met Simon White, sr., when he was in Georgetown, some time in the fall of 1877. I know of a railroad company called the Colorado Central Railroad.

Int. 3rd. Were you acquainted with the stock of merchandise shipped by S. White & Co. over the defendant's railroad from Georgetown, in the county of Clear Creek and State of Colorado, to Denver, in the county of Arapahoe, in said State, on the first day of January, A. D. 1878? If yea, of what kind of merchandise did said stock consist?

Ans. to 3rd int. I do not know what goods were shipped. I only know that about January 1st, 1878, the stock claimed by S. White & Co. was shipped from this place to Denver; at least I always understood that all of said stock was shipped. The stock consisted of men's and
83 boys' clothing, boots, shoes, hats, and caps; also, gents' furnishing goods.

Int. 4th. Under whose personal management was the said stock of merchandise while it was in Georgetown aforesaid?

Ans. to 4th int. Under S. White, jr., and one Kline.

Int. 5th. How well acquainted were you with said stock of merchandise, and what experience have you had, if any, in buying and selling the same kinds of merchandise?

Ans. to 5th int. I was not very well acquainted with the stock. I never examined the same to form an opinion concerning it. I am in the clothing business, and have been for eight years.

Int. 6. Did you see the said stock of merchandise when it was being packed for shipment to Denver as aforesaid?

Ans. to 6th int. I know nothing of the packing of said goods further than that when I was passing by the store-room occupied by S. White & Co. I saw packing of the goods going on, and saw boxes being rolled out of the store-room and the same loaded on transfer wagons.

84 Int. 7th. Please state as nearly as you can, from your knowledge of said stock of merchandise, and the cost of such merchandise delivered in Georgetown aforesaid, what its value was on the said first day of January last.

Ans. to 7th int. I cannot state with anything like certainty, but, from casual observation, I should judge about eight thousand dollars. But its value may have been more or less. I can only state values when I have made invoices.

Int. 8th. In what condition was said stock of merchandise when shipped as aforesaid, and were the articles comprising it new or second-hand stock?

Ans. to 8th int. I never knew anything injurious of the stock. I suppose it was in good condition. It consisted wholly of new goods.

Int. 9th. Do you know of any other matter or thing of benefit or advantage to the plaintiff touching the matters in controversy in this cause in addition to what you have already stated? If yea, state the same as fully as if thereto specially interrogated.

Ans. to 9th int. I have stated everything known by me.

85 Cross-int. 1st. Did you ever see S. White & Co. have any stock of goods? If so, state fully who composed the firm of S. White & Co., and state how you know it was shipped by them, when it was shipped, and by whom; how many boxes or bales, and what they contained; state how much of the stock was shipped to Central City, Colorado; how much and what part was shipped to Golden, and how much and what part was shipped to Boulder.

Ans. to 1st cross-int. I never saw S. White & Co. except as I stated in my direct testimony. Don't know who composed the firm; am unacquainted with the particulars of the shipping asked for.

Cross-int. 2nd. State fully who counted and boxed the goods, how boxed, and how marked; and state fully how you know what statement you make about it; state fully and particularly where you was when goods were packed and boxed, and whether they were shipped at the time they were boxed, or whether they did or did not remain in store for some days, and if so, with whom; and whether goods were

86 or were not left open after packing until sent off; and state whether you saw any of them shipped, or marked for shipping, and how you know what goods and how many were shipped to Denver.

Ans. to cross int. 2nd. I don't know any of the particulars concerning the boxing and marking of the goods, nor place of shipment, except as stated in my direct examination, and that the stock was here and was removed from here by shipping it.

Cross-int. 3rd. State how long S. White & Co. or Simon White had been doing business in Georgetown, and when you first knew him, and why he sent goods away from Georgetown?

Ans. to cross-int. 3rd. About six months, I think. I first knew Simon White, jr., in Georgetown, when I also first met S. White, sr. Don't know why the goods were removed from Georgetown.

Cross-int. 4th. If you say the goods were new or second-hand, state particularly what goods, and how much of the stock was new, and how much second-hand; also state particularly what kind of goods they were, whether old and out of style or new and fashionable, and whether

87 they were or were not shop work and to any considerable extent unsalable or slow of sale; and if so, why?

Ans. to cross-int. 4th. The stock was new and was a fair stock for our market; as before stated, I never heard nor learned of anything injurious to the stock, which was a stock I should judge brought from eastern markets for sale here. As to whether a stock is salable depends on a combination of conditions, as location, prices asked, acquaintance of the salesman, and his adaptation to the work.

Cross-int. 5th. If you attempt to put any value on the goods in stock that you saw in Georgetown, state particularly whether you know that the goods claimed to have been sent to Denver for which suit is brought were as good as the average of the stock, and state specially how you know the kind and quality of the goods in question, and how you arrive at the value.

Ans. to 5th int. I don't know of any division of the stock nor what what part was shipped to one place or another. My acquaintance with the stock was casual. Judging from observation and appearances, it was worth about eight thousand dollars.

88 Cross-int. 6th. State when you last saw the goods. When you last saw Simon White, and where was he residing from Dec. 20th, 1877, to Jan. 5th, 1878, and where he was during these dates?

Ans. to cross-int. 6th. Saw Simon White, jr., last *last* week; cannot now tell where he was at those dates. My impression is he was here all or at least some of the time. Cannot tell what engaged him then.

Cross-int. 7th. Did Simon White or White & Co. ever do business in Denver; if so, when, for how long, where, and what kind of business?

Ans. to cross-int. 7th. I do not know of S. White & Co. or Simon White doing business in Denver at any time; never knew them till they came to Georgetown.

Cross-int. 8th. If you say said White or White & Co. ever did business in Denver, state who had charge of it, and when he took charge thereof, and how you know the fact of their doing business or who had charge of it.

Ans. to cross-int. 8th. I don't know.

Cross-int. 9th. State if you know to whom the goods sent Denver
89 and other places above named were consigned, whether to White & Co., S. White & Co., or to S. White, or to whom were they consigned?

Ans. to 9th cross-int. I do not know.

(Signed) SAMUEL STRAUSSE.

W. T. HUGHES, *Com'r.*

Certificate by commissioner.

Certificate.

I, W. T. Hughes, of Georgetown, in the county of Clear Creek, in the State of Colorado, a notary public in and for said county, a commissioner duly appointed to take the depositions of the said Samuel Strausse and Joseph Behm, witnesses, whose names are subscribed to their foregoing depositions respectively, do hereby certify that previous to the commencement of the examination of the said Samuel Strausse and Joseph Behm, as witnesses in the said suit between the said Asher A. White, administrator of Simon White, deceased, plaintiff, vs. The Colorado Central Railroad Company, defendant, they were respectively and severally sworn by me to testify the truth in relation to the matters in controversy between the said parties so far as they should be interrogated concerning the
90 same; that the said depositions were taken by me, W. T. Hughes, and reduced to writing by me at my office in the town of Georgetown, in the county of Clear Creek, and State of Colorado, on the 9th day of July, A. D. 1878; and that after said depositions were taken by me as aforesaid, the interrogations and answers thereto as written down was read over to the said witnesses, and thereupon the same was signed and sworn to by the said deponents, Samuel Strausse and Joseph Behm, before me, at the place and on the day and year last aforesaid.

[NOTARIAL SEAL.] (Signed) WILLIAM T. HUGHES,
Commissioner and Notary Public within and for said County of Clear Creek.

(Endorsed:) 141. Circuit court U. S. Asher A. White, admin'r, &c., vs. Colo. Cen'l R. R. Com. et al. Depositions of Strausse and Behm a/c plaintiff. Opened, published, and filed this 16th July, A. D. 1878. (Signed) Edward F. Bishop, clerk.

91 And afterward, and on, to wit, the 17th day of July, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878, of said court, present the Honorable Moses Hallett, district judge, the following additional proceedings were had and entered of record in said court and in said cause, to wit:

Order.—Set for trial.

ASHER A. WHITE, ADMINISTRATOR,
vs.
COLORADO CENTRAL RAILROAD COMPANY. } 141. Action for damages.

At this day it is ordered that this cause be set down for trial on Friday next, the 19th instant.

And afterward, and on, to wit, the 19th day of July, A. D. 1878, the same being one of the regular judicial days of the July term, A. D. 1878, of said court, present the honorable Moses Hallett, district judge, the following additional proceedings were had and entered of record in said court and in said cause, to wit:

92 *Order.—Jury come trial.*

ASHER A. WHITE, ADMINISTRATOR,
vs.
COLORADO CENTRAL RAILROAD COMPANY. } 141. Action for damages.

At this day comes the said plaintiff, by J. Q. Charles, esq., his attorney, and the said defendant, by H. M. Teller, esq., its attorney, also comes. And thereupon comes a jury, to wit:

1 W. D. Brown,	7 William T. Lambert,
2 J. J. Thomas,	8 D. W. McCormick,
3 Thomas T. Willey,	9 David H. Wood,
4 John M. Tallman,	10 Frederick H. Kent,
5 A. F. Goodrich,	11 Allison H. Eggleston,
6 John N. Randall,	12 John T. Brownlow,

good and lawful men. And they are duly selected and tried, impanelled, and sworn to well and truly try the issues herein joined, and a true verdict give according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment. And the said jurors being each duly cautioned by the court not to converse among themselves, or with others, touching this cause, or the matters at issue herein, are permitted to separate to meet the court at its next incoming.

93 And afterwards, and on, to wit, the 20th day of July, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878, of said court, present the honorable Moses Hallett, district judge, the following additional proceedings were had and entered of record in said court and in said cause:

Order, trial and verdict.

ASHER A. WHITE, ADMINISTRATOR,
vs.
COLORADO CENTRAL RAILROAD COMPANY. } 141. Action for damages.

At this day come again the said parties by their attorneys respectively. And the said jurors being now all here present, and in the jury box, the trial of the issues herein joined is resumed. And the said jurors having heard the evidence produced herein, and the instructions of the court, retire to their room, in charge of a sworn bailiff, to consider of their verdict.

And afterwards, and on this same day, come again the said jurors, and on their oaths do say they find in favor of the defendant on the issues herein joined on the first count in the said complaint, and find in favor of the plaintiff on the second count, and assess the damages at

four thousand seven hundred and four dollars and seventy-five cents ($4,704.75).

And on the same day, to wit, the 20th day of July, A. D. 1878,
94 certain exhibits in the bill of exceptions herein referred to, and by the clerk marked respectively A, B, and C were filed in said court and in said cause.

EXHIBITS A, B, & C.

A.

G. W. 11-17-77-1,000. A. D. 29.

COLORADO CENTRAL RAILROAD,
D'R STATION,
1—31, 1878.

DEAR SIR: The following goods consigned to you have arrived at this station on pro.
No. , from . Charges, $13.31.

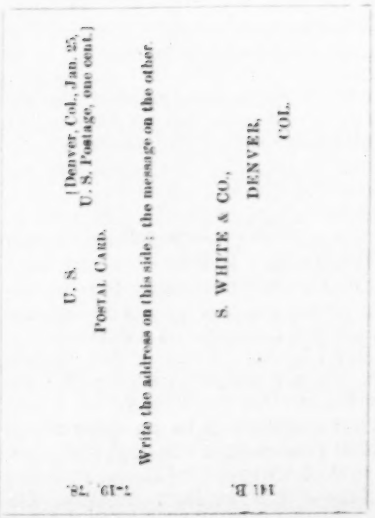
1 BOX CIGARS.

The above-named goods will be delivered to you on payment of freight and charges thereon. If not called for by you personally, a written order must be furnished stating to whom you desire the freight to be delivered. Cash, in all cases, on delivery of the freight. No agent of this company has authority to give credit.

☞ Storage will be charged after 5 days.

(Signed) C. H. PHELPS.
Agent.

B.



G. W. 11-17-77-1,000. A. D. 29.

COLORADO CENTRAL RAILROAD,
DENVER STATION,
Jan. 25th, 1878.

DEAR SIR: The following goods consigned to you have arrived at this station on pro.

No. , from . Charges, $.

Please call at this office on business & oblige.

The above named goods will be delivered to you on payment of freight and charges thereon. If not called for by you personally, a written order must be furnished stating to whom you desire the freight to be delivered. Cash, in all cases, on delivery of the freight. No agent of this company has authority to give credit.

☞ Storage will be charged after 5 days.

(Signed) C. H. PHELPS.
Agent.

93 C.

G. W.-9-6-77-S. M. A. D. 28, C.

D. T. No. .] GEORGETOWN STATION, *Jan. 1st*, 1878.

Received from S. White & Co., by the Colorado Central R. R. Co., the following property, marked and numbered as below, to be delivered at Denver, Colo., Station, to consignee or order.

Consignee and destination.	Marks.	Number and description of articles.	Weight.
S. W. & Co., Denver, Colo...	1 to 33	33 cases clothing, boots & shoes, &c., 3 trunks, 2 forms.....	5,400

(On the margin in red:) C. 7, 19, 78. 141.
Car No. 28. For the Colorado Central R. R. Co.
(Signed) F. L. PECK, *Agent*.

And the said instructions given to the jury are in words and figures as follows, to wit:

Instructions.

Whether the defendant is liable as a carrier for the value of the goods depends upon these considerations:

If neither White nor any of his agents had any notice or knowledge or reason to believe that the goods had arrived at defendant's depot in Denver before they were destroyed by fire, then the defendant is liable.

It is not contended that any notice of the arrival of the goods was given by the company, but it is contended that the goods arrived
96 on the 3d, and that the agents of plaintiff's intestate called at deft's depot on the 3d or 4th of January, and there gained such information of the arrival of the goods as was sufficient to advise plaintiff's intestate of the fact & that the goods were ready for delivery. If this is true the plaintiff's intestate was in the same situation respecting the goods as if he had received due notice of the arrival of the goods at the time of receiving the information.

It is not important to consider how Mr. White was advised of the receipt of the goods by defendant if he was in fact so advised. Whenever he or any of his agents became aware of the arrival of the goods in Denver it was his duty, within such reasonable time as was necessary for that purpose to remove the goods from defendant's warehouse, and if he did not do so defendant cannot be held as a carrier. In this connection it becomes important to consider when, if at all, Mr. White's agent received information of the arrival of the goods. If they received such information on the 3d of January as stated by the witnesses for defendant, then there was sufficient time for removing the goods before the morning of the 5th and the defendant cannot be liable as a carrier.

But if such information was not received by Mr. White or his agents until the 4 day of January, 1878, there is a question whether the remainder of that day was reasonably sufficient for removing the goods from defendant's warehouse. That question is to be determined
97 upon all the circumstances as what remained of the day, the number of packages to be removed, and the weight of them, whether a team could be procured for removing them and the like. If upon con-

sidering all the circumstances you are of the opinion, upon the evidence, that *that* the remainder of the day, after the agent or agents of plaintiff's intestate were advised that the goods were at the depot, was reasonably sufficient for removing them then the defendant is not liable as carrier. But if the time which remained of that day was not sufficient for that purpose and the goods were destroyed the next morning the defendant is responcible for the value of the goods.

This is the first cause of action, and we wish you to return a verdict specially upon that. If your verdict should be for defendant more than a statement of the finding will be required. But if you should find for plaintiff you will, of course, assess the damages in the usual form, and in addition thereto you will say when, if at all, Mr. White or either of his agents was advised of the arrival or receipt of the goods at defendant's depot and that they were ready for delivery, giving the day of the month and the hour as nearly as the evidence may enable you to do.

As to the second cause of action, the liability of defendant if
98 any exists depends upon the effect of storing powder in the warehouse if any was stored there. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of powder in the house, the defendant is liable. In order to fix such liability, however, it must appear to you from the evidence that the loss was certainly occasioned or produced by that cause. If those who were engaged in suppressing the fire would have been able to save plaintiff's goods and would have done so if no powder had been kept in the building the defendant may be held. But if that is a doubtful matter and it is uncertain whether the presence of powder in the house occasioned the loss the defendant is not liable.

As to this cause of action, also, you are requested to find specially, but it will be sufficient to put the finding in general terms, adding the damages of course if you find for plaintiff.

The jury are further instructed that if they find for the plaintiff they will assess his damages at the value of the goods in the market at Denver, with interest on the amount thereof from the date of their destruction to the present time, at the rate of ten per cent. per annum, deducting therefrom the defendant's reasonable charges for transporting
99 the said goods from Georgetown to Denver, and the value of the goods, if any, saved from the fire, and now in the possession of the defendant, ready to be turned over to the plaintiff.

(Indorsed:) No. 141. Circuit court. Asher A. White, adm'r, vs. Colorado Central R. R. Co. Instructions given. Filed July 20, 1878. (Signed) Edward F. Bishop, clerk, by Henry Sparnick, dep'ty.

And the instructions to the jury asked by the said plaintiff are in words and figures as follows, to wit:

Instructions asked by plaintiff.

In the circuit court of the United States within and for the district of Colorado.

ASHER A. WHITE, ADMINISTRATOR OF SIMON WHITE, deceased, plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, DEFENDANT.

And now on this day this cause coming on for trial before a jury, the

100 said plaintiff, by his attorneys, Charles & Dillon, asks the coert to charge the jury on behalf of the plaintiff as follows:

1st. The jury are instructed that it is admitted by the defendant that it received the cases, trunks, and forms mentioned in the bill of lading in evidence from the plaintiff; that it received the same in its capacity as a common carrier, to be carried by it from Georgetown to Denver, in the said State of Colorado, and that it received the said cases, trunks, and forms of the plaintiff at Georgetown, on the first day of January, A. D. 1878. It is further admitted by the defendant that it has not delivered any of the said cases, trunks, and forms, or any portion of the contents thereof, to the plaintiff, and that the same, together with a portion of their contents, were destroyed by fire while in its possession, on the morning of the 5th day of January, A. D. 1878.

2nd. The jury are further instructed that when the defendant received the goods contained in the said cases, trunks, and forms, at Georgetown, of the plaintiff, for transportation as aforesaid, the law imposed upon the defendant this liability, to wit: That it should safely and securely carry the said goods from Georgetown to Denver aforesaid, and there deliver them to the consignee in as good order and condition as when received by it in the first instance, and that it should continue to be liable therefor, as an insurer of the goods, from the date of receiv-

101 ing them at Georgetown until the elapsing of a reasonable time after notice given by the defendant to the consignee of said goods of their arrival in Denver aforesaid, within which to examine the same and take them away, which notice it was incumbent upon the defendant to give to the consignee within three days after the arrival of said goods in Denver aforesaid. And if you believe from the evidence that such notice was not given within three days after the arrival of said goods in Denver, or, if given, that a reasonable time thereafter had not elapsed within which the consignee or his agent could examine them and take them away before the same were destroyed by fire, you will find for the plaintiff.

3rd. The jury are further instructed that if they believe from the evidence that Samuel Cline, one of the plaintiff's agents, called at the defendant's freight office or depot on January 3rd, 1878, and enquired if the goods in question had arrived, and was then and there told by one of the defendant's employees that said goods had not arrived, and that afterwards, on the fourth day of January, 1878, he, in company with Samuel White, another agent of the plaintiff, called again at said office or depot and again enquired of the defendant's freight agent if said goods had arrived, and they were informed by said agent that he did not know, but requested them to step back and ask the boys in the freight-house about them, and that said White and Cline did so,

102 and were then and there informed by those in charge of the freight room that they did not know, but that some cases had arrived, but for whom they did not know. And that on the afternoon of said 4th of January the said White engaged a salesroom for the said goods, and the said Cline made diligent efforts to procure teams to take said goods away from the defendant's depot or warehouse, and was unable to get any to do it before the next morning, and that the said goods were destroyed by fire while in the defendant's possession, on the morning of the 5th of January, 1878, before working hours, you will find for the plaintiff, notwithstanding you may also believe that said goods actually arrived in Denver on the 3rd of January, 1878, and were thereupon stored in the defendant's warehouse.

4th. The jury are further instructed that the defendant, having under-

taken, for a reasonable compensation, to carry the goods in question from Georgetown to Denver, if you believe from the evidence that the defendant carried said goods to Denver and there stored them in its freight depot or warehouse, upon such storing of the goods, and after notice to the consignee, the defendant became a bailee thereof for hire, and as such bailee was by law responsible for the security and fitness of the place where stored, and was bound to use all precautions necessary to the safety of the goods, and for ordinary care and attention of their servants and agents in keeping and delivering them when called for.

103 The jury are further instructed that in determining whether or not the defendant, as a warehouseman, kept and stored the goods in question with due and proper care, or so carelessly and negligently that they are lost and destroyed, while in the defendant's possession, by the fire of the 5th of January last, you are warranted in taking into consideration the fact of the defendant's having stored in the same warehouse with said goods a large quantity of powder, and the effect that powder had upon those who were attempting to rescue the goods from the fire; also, whether or not the said fire was caused by reason of the defendant's having a defective flue for its heating stoves in said warehouse, or whether or not the defendant used the means at its command for extinguishing the said fire when discovered, or whether or not the defendant bestowed more care upon the safety and preservation of its own goods and property than that of the plaintiff.

The jury are further instructed that they are the judges of the weight of evidence and the credibility of the witnesses, and in determining such weight and credibility you should take into consideration the consistency or inconsistency of their statements, their manner upon the stand, the probability or improbability of their statements, and the fact of their being in the employ of the defendant.

104 (Endorsed:) 141. Circuit court. Asher A. White, adm'r, vs. Colorado Central R. R. Co. Instructions asked by plaintiff. Filed July 22nd, A. D. 1878. (S'g'd) Edward F. Bishop, clerk.

And the instructions to the jury asked by the said defendant are in words and figures as follows, to wit:

Instructions asked by defendant.

SIMON WHITE
vs.
COLORADO CENTRAL RAILROAD COMPANY.

Instructions asked by defendant.

The court instructs the jury that it was not and is not unlawful for the defendant to transport powder on its line of railroad, nor to stow the same in its depot, preparatory to the delivery thereof to the owner or consignee.

The court further instructs the jury that the defendant was under no obligation to provide water facilities or hydrants for the protection or preservation of its depot, or the goods therein stored, from fire, nor to keep such water facilities or hydrants in repair, if provided.

105 The court further instructs the jury that the storing of powder by the defendant in its warehouse or depot, whilst it may be considered an act of negligence, yet, in this case, the same can make no

difference unless you believe from the evidence that the storing of such powder was the direct cause of the fire, or that the powder itself was the direct cause of the said fire.

WHITE
vs.
COLORADO CENTRAL R. R. Co.

The court instructs the jury that if they believe from the evidence that the agents of the said S. White & Co., the plaintiff in this suit, know that the goods where in Denver, at the defendant's depot, & ready for delivering on the afternoon of the 4th of January, 1878, and that said agents promised to take them away on that day or the next, & that on the morning of the fifth of January they were burned in defendant's depot, they should find for the defendant unless the plaintiffs has proved to your satisfaction that the defendant was guilty of negligence in keeping the goods, so that the loss may fairly be attributed to the negligence of the defendant.

WHITE
vs.
COLORADO CENTRAL R. R. Co.

106 2nd. The court instructs the jury that if they believe from the evidence that the goods claimed to be burned in this case was in the depot of the defendant on the 4th day of January, 1878, and that the same was ready for delivering to the pl'ff or his agents, & that the plaintiff or his agents at Denver knew that to be the fact on said 4th day of January, the plaintiff cannot recover in this action for the loss of such goods by the burning of said goods in the depot of defendant, except upon proof that defendant was guilty of negligence in the care of the goods, and that by reason of such negligence the loss occurred.

(Endorsed:) No. 141. Circuit court U. S. Asher A. White vs. Col. Cen'l R. R. Co. Instructions asked by defendant. Filed July 22d, A. D. 1878. (S'g'd) Edward F. Bishop, clerk.

And afterwards, and on, to wit, the 23rd day of July, A. D. 1878, came again the said defendant by Willard Teller, esq., its attorney, and filed in said court and in said cause its motion for a new trial of the issues herein joined, and the said motion is in words and figures as follows, to wit:

Motion for new trial.

107 In circuit court of the United States, eighth circuit, district & State of Colorado.

ASHER WHITE, ADMINISTRATOR, &C.,
vs.
COLORADO CENTRAL RAILROAD COMPANY.

Now comes the said defendant by H. M. & Willard Teller, and A. H. De France, its att'ys, & moves the court for a new trial, & for setting aside the verdict in the above-entitled cause, and alleges the following grounds therefor:

1st. The court erred in the admission of testimony on the trial herein.

2nd. Court erred in rejecting competent and relevant testimony offered by the defendant herein on the trial.

3rd. Court erred in instructing the jury that the question of negligence of the defendant as to the powder in defendant's warehouse was a question of fact for the jury.

4th. The court erred in submitting the question whether the deposit of the powder in defendant's warehouse was, under the facts in evidence in the case, negligence, or want of care on part of the defendant.

5th. The verdict is contrary to law, and not supported by the evidence.

6th. There was no evidence of any want of care or diligence on part of the defendant in its character of warehousemen in respect to the pl'ff goods furnished by the fact that powder was stored in the defendant's warehouse, & no evidence that the presence of said powder in said warehouse or depot was the cause of the loss of pl'ff's goods.

108 7th. By the evidence it is shown that the powder so deposited in the def't's depot at time of the fire was in transit, and that the defendant was holding the same as a common carrier, and that such depot was the usual place of deposit for such goods, delivered & held by it as a common carrier at Denver, and as there was no evidence that the carriage of powder is dangerous, or is evidence of any want of care on part of the carrier, and no law prohibiting its carriage, if any loss did occur to the defendant of goods held by it in its depot as a warehousemen, by reason of the presence of the powder in transit, the said defendant was not liable therefor, and the pl'ff in this case when he left the goods with defendant, took and assumed all the risks that were attendant upon the regular business of the defendant both as warehousemen & common carriers.

8th. Since it was in evidence that defendant was a common carrier of goods from Georgetown to Denver, and the carriage of powder is placed under no by law, defendant was under obligation by law to carry the powder from Golden, where the evidence shows it was delivered to it, to Denver, the place of consignment, and if any loss of goods did arise by reason of the storage of powder in defendant's depot, before the defendant had discharged itself of its liability as a common carrier, then the pl'ff could not recover, and the jury should have been so instructed, or at least no question of negligence should have been left to the jury under the evidence, for there was no negligence.

9th. Court erred in refusing to give instructions asked by the defendant.

109 H. M. & WILLARD TELLER,
A. H. DE FRANCE,
Att'ys for Def't.

(Endorsed:) 141. In circuit court. Asher White vs. Colorado Central R. R. Company. Motion for new trial. Filed July 23d. A. D. 1878. (S'g'd) Edward F. Bishop, clerk, by Henry Sparnick, dep'ty. Teller, Teller & De France, at 'ys for def't.

And afterwards, and on, to wit, the 26th day of August, A. D. 1878, the same being one of the regular judicial days of the July term, A. D. 1878, present the honorable Moses Hallett, district judge of said district, the following additional proceedings were had and entered of record in said court, and in said cause, to wit:

Order.—Motion for new trial denied, &c.

ASHER A. WHITE, ADMINISTRATOR OF SIMON White, deceased,
vs.
COLORADO CENTRAL RAILROAD COMPANY.
} 141. Damages.

At this day comes the said plaintiff by J. Q. Charles, esq., his attorney, and the said defendant by Williard Teller, esq., its attorney, also comes.

And the motion of the said defendant for a new trial herein having heretefore come on to be heard, and having been argued
110 by counsel and taken under advisement by the court, and the court being now sufficiently advised in the premises, it is ordered that the said motion be denied.

Wherefore, on motion of the said plaintiff, let judgment be entered upon the verdict of the jury herein.

And thereupon on its motion it is ordered that the said defendant have leave to file herein its bill of the exceptions reserved by it upon the trial of the issues herein joined within twenty (20) days from this day.

And thereupon on the same day, to wit, on the 26th day of August, A. D. 1878, judgment was duly entered of record upon the verdict of the jury, upon the judgment book as provided by law, and the rules of the said court, in words and figures, as follows, to wit:

Order.—Judgment.

ASHER A. WHITE, ADMINISTRATOR OF THE estate of Simon White, deceased,
vs.
COLORADO CENTRAL RAILROAD COMPANY.
} Action for damages.

On this 26th day of August, A. D. 1878, the same being one of the regular judical days of the July term, A. D. 1878, of the court, there being present the honorable Moses Hallett, district judge, it is
111 considered by the court that the said plaintiff do have and recover of and from the said defendant four thousand seven hundred four dollars and seventy-five cents ($4,704.75) his damages as aforesaid assessed, by occasion of the premises in his complaint mentioned, and his costs by him in this behalf laid out and expended, or to be laid out and expended, to be taxed and have execution therefore.

And afterwards, and on the 27th day of August, A. D. 1878, the same being one of the regular judicial days of the July term, A. D. 1878, of said court, present the honorable Moses Hallett, district judge, the following additional proceedings were had and entered of record in said court and in said cause, to wit:

Order.—Motion for rule on defendant denied.

ASHER A. WHITE, ADMINISTRATOR, ETC.,
vs.
COLORADO RAILROAD COMPANY.
} 141. For damages.

Order.—Motion for rule on def't to turn over, denied.

At this day comes the said plaintiff by H. C. Dillon, esq., his attor-

ney, and the said defendant by Willard Teller, esq., its attorney, also comes.

And the motion of the said plaintiff for a rule on the said defendant to turn over certain goods and chattels in said defendant's answer set forth and described coming on now to be heard, is argued by
112 *by* counsel, and the court being now sufficiently advised in the premises, it is ordered that the said motion be denied.

And afterwards and on, to wit, the 28th day of August, A. D. 1878, came again the said plaintiff by H. C. Dillon, esq., his attorney, and filed in said court and in said cause his motion for a rule on the defendant to deliver certain goods and chattels to plaintiff.

And the said motion is in words and figures as follows, to wit:

Motion for order on defendant to deliver goods to plaintiff.

In the circuit court of the United States, sitting within and for the district of Colorado, of July term, A. D. 1878.

ASHER A. WHITE, ADMINISTRATOR, ETC., plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, DEfendant.

And now on this day comes the plaintiff by Charles & Dillon, his attorneys, and moves the court for an order herein, directing the defendant to deliver to the plaintiff, his agent or attorney, all of the merchandise mentioned and described in the complaint herein, and which was not destroyed by the burning of the defendant's depot or ware-
113 house, on January 5th, A. D. 1878; and which said merchandise is also more particularly described in the defendant's answer herein, and to which reference is hereby made.

August 27th, A. D. 1878.

(S'g'd) CHARLES & DILLON,
Att'ys for Plaintiff.

(Endorsed:) 141. Circuit court of United States Tr. Colorado. Asher A. White, adm., v. Colorado Central Railroad Company. Motion for order on defendant to deliver goods to pl'ff. Filed Aug't 28th, A. D. 1878. (S'g'd) Edward F. Bishop, clerk. Charles & Dillon, att'ys pl'ff, Denver, Col.

And afterwards and on, to wit, the 30th day of August, A. D. 1878, the following opinion of the honorable Moses Hallett, district judge, on the motion of the said defendant for a new trial herein, was filed in said court and in said cause, to wit:

Opinion.

ASHER A. WHITE, ADM'R, AND C.,
vs.
COLORADO CENTRAL R. R. CO.

Upon motion for new trial.

HALLETT, J.:

On the 1st of January last plaintiff's intestate shipped a lot of dry goods and clothing from Georgetown to Denver over def't's line. The

114 goods were rec'd at Denver and placed in def't's warehouse on the morning of the 3rd of the same month.

Two days later they were destroyed by fire which originated in the building without fault of def'ts. This action in which pl'ff seeks to recover the value of the goods so destroyed is founded upon an alleged liability of def'ts to pl'ffs as a common carrier, and as a warehouseman. As to the first count in the declaration in which pl'ffs sought to charge def't as a common carrier the jury have found against the plaintiff, and thus all questions arising on that count have been eliminated from the case. On the second count in which def't is charged with negligence as a warehouseman, the jury found for pl'ff in the sum of $4,704.75, and the motion now to be considered is directed against that verdict.

It seems from the evidence that def't's warehouse was a long wooden structure 100 f't or more in length, and that the company's offices for transacting its freight business were kept in one end of it. These offices were divided off from the main building by partitions, and the remainer of the building was used for storing goods. At about the center of the building on each side and communicating with the part which was used for storage were large doors, through which the goods were passed when received into or taken out of the building. The plaintiff's goods when rec'd were put in that end of the building
115 which did not contain the office, and, of course, at some distance from the doors last mentioned.

By the same train which brought p'ff's goods a quantity of gunpowder, amounting to about 160 kegs, was also rec'd, and this powder was put by def'ts in the same room with pl'ff's goods, but upon the other side of the doors before mentioned, and towards the offices which were in that end of the building. So that with reference to the doors which opened through the warehouse, it may be correct to say that the offices and the powder were in one end of the building, while the pl'ff's goods were in the other end of the same building. But the powder was in fact pretty near the door on that side where it lay and between the offices and the plaintiff's goods.

The fire which destroyed the building and the goods when first discovered was in the roof immediately above the offices, and of course, at some distance from the plaintiff's goods.

Thus it appears that the fire was in one end of the building and the plaintiff's goods in the other, while the powder was between the fire and the goods, on the same side of the large doors before mentioned as the fire. This was the situation when members of the fire department arrived in considerable force on the ground with their apparatus for the purpose of extinguishing the fire. The weather was cold, and some delay occurred before water was obtained, but three or four streams were soon brought to bear so that under ordinary circumstances the flames might have been suppressed before half the building was destroyed
116 One witness testifies that there was an opportunity to "cut off" the fire at the large doors before mentioned by carrying the water in at that place, and playing on the fire from the inside. But nothing of this kind was attempted, and indeed the firemen would not go within 70 or 80 f't of the building on the outside, because they feared injury from the powder. Some testimony was given at the trial to show that this fear was unfounded, but if the experts who testified on that point had been present at the fire to explain the properties of gunpowder to the terrified firemen it is doubtful whether the explanation would have been entirely satisfactory. The theory advanced is that metallic cans in which the powder was put are so expanded and cracked by the heat of a burning

building that the powder escapes, and in that condition, if ignited, it produces only a flash in the pan, which is not at all dangerous to those who are outside of the building; if, however, one who is inside the building "swallows the fire," as one of the witnesses said, it is deadly; so that even on this theory it was not safe to go into the building at the large doors before mentioned for the purpose of suppressing the fire. So, too, a prudent person might well be excused from assuming that all of the cans would be cracked and laid open by the heat so as to render them harmless.

Altogether it may be said that this evidence does not prove nor tend to prove that the powder was not dangerous to life in the
117 situation where it was found, but merely that the workmen might have approached the building more closely without danger to themselves. Whether they could have worked more effectively at a distance from the building of 25 or 30 f't than at a distance of 80 f't does not appear, but may be a matter of reasonable inference. It does, however, appear that the gunpowder prevented the firemen from going in at the large doors before mentioned with hose, and there operating against the fire.

All the witnesses agree that this movement would, under the circumstances, have been full of danger, and it seems probable that it was not made for that reason.

One witness testified that he suggested it to the firemen, and was answered that it was dangerous to go there on account of the powder. Looking to the form of the building, the fact that it was built of wood, and the situation of pl'ff's goods with reference to the fire, it also seems probable that the goods would have been saved if the powder had not been stored in the building. Upon the evidence then showing or tending to show that the loss of the goods was due to the presence of powder in the warehouse, the court charged the jury as follows:

"As to the second cause of action, the liability of defendant, if any exists, depends upon the effect of storing powder in the warehouse, if any was stored there. You are advised that storing a considerable
118 quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of powder in the house the defendant is liable. In order to fix such liability, however, it must appear to you from the evidence that the loss was certainly occasioned or produced by that cause. If those who were engaged in suppressing the fire would have been able to save plaintiff's goods, and would have done so if no powder had been kept in the building, the defendant may be held; but if this is a doubtful matter, and it is uncertain whether the presence of powder in the house occasioned the loss, the defendant is not liable. Upon that point you remember what the witnesses said about it. You determine as well as you can whether this loss certainly proceeded from that cause, from the presence of the powder. If it is doubtful in your minds upon the evidence here whether the loss was occasioned by that, that is to say, if withdrawing the powder from the house you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable upon that. The only act of negligence, as it seems to me from the evidence here, was the putting of the powder there, and you must be able to ascribe that loss to that cause, and certainly to that if you are to hold the defendant upon that; that is the position in which that matter stands."

That this principle is applicable to ordinary warehousemen would appear to be beyond question. To store or deposit gunpowder in

119 large quantities in any place in a city where it will endanger life and property is a public nuisance. (Cheatham vs. Shearon 1st Swan, 213; Myers vs. Malcolm, 6 Hill, 292; Hay vs. Cohoes Co., 2 New York, 159.) The case in 6th Hill shows that the party storing the powder will be liable for any damage that may result from it, and the same view is expressed in some of the text-books. (1st Addison on Torts, 308; Wood on Nuisances, §142.)

Warehouses are usually, if not always, located in cities where the danger from fire is great, and of course keepers of such houses must provide against the danger with reasonable care. It is often difficult to determine whether such care has been used, but no embarrassment is felt respecting the point now under consideration.

With reference to warehousemen in general, we have only to ask whether a prudent man would store a large quantity of gunpowder in a building with other goods in a populous city, whether that is the usual and ordinary course of business, to decide the question of negligence. But it is said that a railway co. which keeps warehouses for the convenience of the public and as a necessary appendage to the business of a carrier is not to be put upon the footing of ordinary warehousemen; that the co. is not a warehouseman by choice but only through the negligence of its patrons, who will not take away their goods as soon as they are received at the company's depot; that as the com-
120 pany may lawfully carry all things, so may it lawfully store whatever it carries, and he who entrusts goods to its charge takes upon himself the risk of such storage. These suggestions are not without weight, but it is believed they ought not to prevail against the general rule which exacts from a bailee for hire reasonable diligence in the care of property entrusted to him.

That a railway co., keeping the property of its patrons in its own warehouse for a reasonable time, until it shall be called for, is to be regarded as a bailee for hire and not as a naked depositary, is now fully settled. (Norway Plains Co. vs. Boston and Maine Railroad, 1st Gray, 273; Wharton on Negligence, § 478.) As such, no reason is seen for relieving it from the duties and responsibilities which attached to that character of bailement.

It must be borne in mind that the co. was not bound to carry the powder on its railway, and still less was it required to store so dangerous an article in its warehouse. (Boston and Albany R. R. Co. vs. Shauls, 107; Mass., 575; Wharton's Negligence, § 856.)

If the company was willing to incur the risk of carrying powder, it must be assumed that it was also willing to take upon itself the liabilities incident to such risk. So, also, it may be said, the matter of storing the powder was disconnected from, and entirely independent of,
121 the carrying; although the company had carried the powder, it was not bound to put it in its warehouse. The consignee might *might* have been required to take away the power in the very hour of its arrival at Denver, or it might have been sent to some warehouse prepared and kept for storing such articles. Putting it in the warehouse of the company was a voluntary act carrying danger to the property of others, and, therefore, wrongful in itself. That it was not an exercise of the reasonable care in preserving the plaintiff's property which the law enjoined seems to be too plain for argument.

Another objection to the charge is that the powder, if at all instrumental in the destruction of pl'ff's goods, was not the proximate cause of that result. To support this objection insurance cases are cited in which it has been held that loss occasioned by explosion of powder may

be connected with the fire which ignited the powder as the proximate cause.

Hence it is claimed that in all such cases the fire and not the powder is the proximate cause of loss.

But there may be, and usually there is, more than one agency or means of producing loss.

Take for instance the car loaded with oil, which escaped from the company's servant and ran down a steep grade and came in collision with a locomotive which set fire to the oil, and thence it was communicated to plaintiff's house. The fire and oil united in the destruction of pl'ff's house, and the cause of all the mischief was a defective brake on
122 the car. If there was negligence in respect to any one of these things, the person chargeable with such negligence was responsible for the loss. (Oil Creek and Allegheny Railway Co. vs. Keighron, 74 Penn. 316.)

So, also, where dry grass was negligently allowed to remain in heaps near def't's railway, and fire was communicated to such heaps by a passing engine, and thence carried by the wind a distance of 200 yds. to pl'ff's cottage, which was destroyed, the def't was held liable. (Smith vs. Landon and S. W. R'y Co., 6 L. R. 14, S. C. 5, L. R. 98.) The fire was, of course, a cause of mischief, but the wind and dry grass were also efficient in communicating the fire to the building, and the negligence was in respect to the grass only. If def't had set the grass on fire negligently, or (if that had been possible) had caused the wind to blow, it would have been liable for the loss in the same manner.

On the same principle, it was held in Massachusetts that one who negligently cut the hose with which water was supplied for suppressing a fire was liable for the damage occasioned by his wrongful act. (Metallic Compression Casting Co. v. Fitchburg R. R. Co., 109 Mass., 278.)

There, as in the case at bar, it was contended that the proxi-
123 mate cause of loss was the fire rather than the act of the defendant. But the court was of a different opinion, saying that "when a man cuts off the hose through which firemen are throwing a stream on a burning building, and thereupon the building is consumed for the want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury.

In all these cases it may be said that the fire is a proximate cause of loss, but it does not follow that it is the only cause standing in that relation to the result.

And so, while it is true that plaintiff's goods were in fact destroyed by fire, it is also true that the gunpowder in the warehouse, by keeping the workmen from the fire, may have contributed to the loss in such way as will make it a proximate cause. "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause." (Sherman and Redfield on Negligence, § 10.)

Without further discussion of what appears to be plain, we have no doubt the powder was near enough to the loss to make the def't liable for its negligence in putting it in the warehouse, if, as the jury have found, it directly contributed to the result, and this objection must be overruled. (Pittsburg & Connellsville R. R. vs. McClurg, 56 Penn. St., 294.) In some cases, as where the conclusion to be drawn is not direct and certain, the rule is otherwise. (R. R. Co. v. Stout, 17 Wal.,
124 663.) But here the facts lead in but one direction.

The def't further relies on the form of the instruction, claiming that the question of negligence was improperly withdrawn from the jury.

It is not denied, and it cannot be successfully claimed, that, where the facts are established, negligence may be a necessary inference of the law to be decided by the court. (Sherman and Redfield on Negligence, § 11; Lauvatee vs. Haniball and St. Joseph R. R. Co., 42 Mo., 193.)

It was admitted at the trial that def'ts' warehouse was in the city of Denver, and whether powder was stored there, although it was not denied, was submitted to the jury on the evidence. It is difficult to discover any other fact that entered into the question of negligence, unless it be the dangerous properties of powder, and perhaps that is the point in controversy.

In the argument of this motion at the bar, counsel were understood as saying that the testimony of witnesses at the trial had raised a doubt as to the effect of powder exploding in a burning building. And if the question to be decided should be as to the effect of such explosion on the building itself, and the contents thereof, their position would not be untenable. The testimony tended to prove that neither the building nor the goods therein were much injured by the explosion.

125 But this is not the point to which the evidence was directed. As before explained, the question was whether the firemen were reasonably deterred by the presence of powder in the building from effective work in extinguishing the fire. And so far was the evidence from showing, or tending to show, that the firemen were not so deterred, that it tended rather to establish the inference of danger to life from the presence of that article, at least as to all those who should attempt to enter the building. So that the evidence referred to did not in any way affect the question of negligence, and if it bore on the other point as whether the firemen where in fact hindered from operating against the fire, that matter was submitted to the decision of the jury on the evidence.

Aside from this I cannot believe that it is in any case necessary or proper to ask a jury to find whether gunpowder is a dangerous compound. The fact is of universal noteriety, familiar to all men, and needs neither finding nor proof to establish it. What would be *the* thought of the demand for such proof in a prosecution for assault with intent to kill and murder? Would it be said that the government must show that the gun was loaded with powder and ball, and that powder is an explosive substance capable of expelling the ball from the gun with great force, and so on?

126 Generally, as to the negligence imputed to def't, it may be said that the act was not to be affected by the circumstances attending it, and therefore it was not to be decided by the jury.

If, under any circumstances, the storing of powder with other goods ina warehouse in a city would be a reasonable exercise of judgment and discretion, the rule would be otherwise; because if the circumstances may give color to the act, and make that fair and unquestionable which otherwise must appear to be culpable, the jury would have to determine whether by the circumstances the act was relieved of the character ascribed to it. But such it is believed cannot be the rule as to any such misconduct. There was nothing in the evidence upon which the jury could say that the act of putting powder in the warehouse was not negligent, and therefore there was nothing to be determined by them on that point, except the matter of putting it there, which was left to them to decide on the evidence.

Whether the presence of powder in the warehouse was the direct and efficient cause of the loss was not, as it could not be, conclusively

shown. But the evidence on that point is regarded as sufficient to sustain the verdict. That was peculiarly a question for the jury. (Milwaukee Ry. Co. vs. Kellogg, 4 Otto, 474.)

127 We do not feel at liberty to disturb the verdict on that ground, and we have not been able to discover any error in any part of the record.

The motion is denied.

(Endorsed:) No. 141. Circuit court U. S. Asher A. White, administrator, &c., vs. Col. Cen. R. R. Co. Opinion. Hallett J., on motion for new trial. Filed Aug't 30th, A. D. 1878. (S'g'd) Edward F. Bishop, clerk.

And afterwards, and on, to wit, the 14th day of September, A. D. 1878, the following certificate of division of the opinion of the honorable the circuit judge and the honorable the district judge in the trial herein was filed in said court and in said cause and entered of record, to wit:

Certificate of division of opinion.

UNITED STATES OF AMERICA,
District of Colorado:

At a circuit court of the United States begun and held at Denver, for the district of Colorado, on Tuesday, the second day of July, A. D. 1878, in the ninety-fifth year of American Independence.

Present, the Hon. John F. Dillon and Moses Hallett.

128 ASHER A. WHITE, ADM'R OF ESTATE of Samuel White, deceased,
vs.
COLORADO CENTRAL RAILROAD COMPANY.

This is an action brought under the civil code of Colorado against the defendant company on a complaint containing two counts, the one alleging a liability on the part of the defendant as a common carrier of goods burned in its warehouse in Denver, January 5th, 1878, the other count alleging liability as a warehouseman for the negligent loss of the said goods by said fire.

On the trial the jury found for the defendant upon the first count of the complaint, and for the plaintiff upon the second count, assessing the damages at the sum of four thousand seven hundred and four dollars and seventy-five cents.

By the statutes of Colorado a common carrier may not rid himself of liability as a carrier except upon notice to consignee of the arrival of the goods at their destination and a reasonable time thereafter to allow the consignee to remove the goods. On the trial the evidence tended to show that defendant received the goods in its capacity as a common carrier at Georgetown, consigned to plaintiff's testator at Denver; that the goods were received at defendant's depot in Denver on the day of January 3rd, 1878; that plaintiff had notice of such arrival about

129 noon of January 4th, and that he left the depot to procure teams to take them away, but did not take them away, and that the said goods were in store in said depot at that time, and were destroyed in the depot by fire on the morning of January 5th, 1878.

The evidence further tended to show that the depot was a long wooden

building of nearly one hundred feet in length, having the offices of the defendant at one end; that on each side of the depot building and near the offices were large doors opening within the part reserved as a freight room, and between the offices and the place where plaintiff's goods were stored; that on the same train with plaintiff's goods came also about 240 sheet-iron kegs containing powder; that such powder was consigned to one Brinker in Denver, was unloaded after plaintiff's goods, and was stored near the office of the defendant in said depot, between the offices and the side door of depot, and from 60 to 75 feet from the plaintiff's goods. The evidence further tended to show that the stoves used in the building were all in the offices, and that the pipes passed into flues, and that the fire when first discovered was in the roof of the building directly over the offices and near the flues. There was no evidence tending to show negligence of defendants as to construction of flues, or the use of the pipes or stoves in the building, and nothing to show how fire originated.

The evidence further tended to show that on the arrival of the
130 fire department at the depot, which was situated within the city of Denver, a delay of from ten to fifteen minutes occurred in getting water to play on the building, on account of one of the hydrants being covered with snow, and said to be frozen up.

The evidence also tended to show that the fact that powder was stored in the building became known to the firemen, and they were deterred from going inside the building with the hose or from approaching it as near as they otherwise would have done, except for fear of explosion of the powder.

The evidence, however, tended to show that firemen could probably have done more efficient service in extinguishing the fire but for the presence of the powder in the warehouse, though there was no witness who said goods could have been saved if powder had not been there, though one witness testified they could have saved that part of the building in which the goods were if the powder had not been in the building.

The evidence further shows that the powder was nearer fire than the goods, and also nearer the door, and that the defendant's men went to work to get out the powder, and succeeded in getting out 77 kegs, when it commenced to explode; the evidence tended to show that it made no concussion, but a kind of blow-out, which may have spread the fire but did not cause any direct injury to the goods, and that the loss occurred by fire, and the water used in suppressing it, and was not caused by the explosion.

131 The evidence of experts in the powder business tended to show that powder in iron kegs of 24 pounds, as in this case, and stored in a wooden building like this depot, was not generally dangerous; that by reason of the drawing of the rivets of the kegs by heat before powder could be reached by the fire, the powder would become so far loose powder as to explode only by a blow-out, not dangerous to parties near by unless a party should draw or breathe in the fumes and flames, which might be done within thirty feet of the explosion.

The evidence having all been received, the court instructed the jury as follows:

"As to the second cause of action, the liability of defendant, if any exists, depends upon the effect of storing powder in the warehouse, if any was stored. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of the powder in

the house, the defendant is liable. It order to fix such liability, however, it must appear to you from the evidence that the loss was occasioned or produced by that cause. If those who were engaged in suppressing the fire would have been able to save plaintiff's goods, and would have done so, if no powder had been
132 kept in the building, the defendant may be held. But if this is a doubtful matter, and it is uncertain whether the presence of the powder in the house occasioned the loss, the defendant is not liable. Upon that point you remember what the witnesses said about it, you determine as well as you can whether this loss certainly proceeded from that cause, from the presence of the powder. If it is doubtful in your mind upon the evidence here whether the loss was occasioned by that, that is to say, if, withdrawing the powder from the house, you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable upon that. The only act of negligence, as it seems to court from the evidence here, was the putting of the powder there, and you must be able to ascribe that loss to that cause, and certainly to that, if you are to hold the defendant upon that. That is the position in which that matter stands."

To the giving of which instruction the defendant excepted, and a new trial was thereupon asked by defendant, and alleged error in giving such instruction was assigned as one of the reasons therefor, which new trial was refused.

On the trial of the cause before the jury the question arose whether, under the facts and circumstances shown in evidence, the said instruction was or was not erroneous. On which question the opinion of the judges were opposed, and final judgment entered on a verdict for the plaintiff.

133 Whereupon, on motion of the defendant, by its counsel, that the point on which the disagreement so happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided, it is ordered that the foregoing statement of the pleadings and the facts which is made under the direction of the judges be certified according to the request of the defendant by its counsel, and the law in that case made and provided.

(Signed) JOHN F. DILLON,
Circuit Judge.

(Signed) MOSES HALLETT,
District Judge.

(Endorsed:) No. 141. In circuit court. Asher White vs. C. C. R. R. Co. Cert. of division. Filed Sept'r 14th, A. D. 1878. (S'g'd) Edward F. Bishop, clerk. H. M. & Willard Teller, A. H. DeFrance, att'ys for def's.

Clerk's certificate.

DISTRICT OF COLORADO, *ss:*

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and fore-
134 going to be a true, perfect, and complete transcript and copy of the record and proceedings in the certain cause in said court lately pending wherein Asher White, administrator of Simon White, deceased, was plaintiff, and The Colorado Central Railroad Company was defendant, as fully as the same still remains on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this first day of October, A. D. 1878.

[SEAL.] EDWARD F. BISHOP,
Clerk.

Clerk's fees: 221 fols. and certificate, $22.45; paid by Colorado Central Railroad Company.

135 Pleas in the circuit court of the United States for the district of Colorado.

Be it remembered that heretofore and on, to wit, the 5th day of November, A. D. 1878, came Williard Teller, esq., an attorney of said court, and filed in said court, and in a certain cause in said court lately pending, wherein Asher A. White administrator of Simon White, deceased, was plaintiff, and the Colorado Central Railroad Company was defendant, a certain stipulation and supersedeas bond, and sued out of said court a writ of error.

And the said stipulation is in words and figures as follows, to wit:

Stipulation as to informalities in writ of error, citation, bond, etc.

In circuit court of the United States for the district of Colorado.

ASHER A. WHITE, ADMINISTRATOR OF THE estate of Simon White, deceased,
vs.
COLORADO CENTRAL RAILROAD COMPANY.

Whereas the Hon. Moses Hallett was temporarily absent from the State just previous to the first day of the October term of the Supreme Court of the United States, so that approval of bond and citation or writ of error in the above entitled cause could not be had; and whereas such bond was ready for filing and the record in appeal made up and
136 sent on to the said Supreme Court of the United States:

Now, therefore, it is hereby stipulated and agreed by the said att'ys for plaintiff and defendant that the said bond may be filed and the said writ and citation issue in said cause as of the 12th day of October, A. D. 1878, and that the said writ and citation may be forwarded to the clerk of said Supreme Court, and that thereupon the said record in this cause may be filed as of the day when it was received by the said clerk the same as though such writ and citation had accompanied said record. And no advantage shall be taken that the said citation and writ did not accompany said record, and the case shall stand for hearing precisely as though said record had been perfected and filed when received by the said clerk.

And, further, that said att'ys for the defendant in error will enter their appearance for def'ts in said court without further service of writ or citation. And that the said pl'ff in error will amend its bond already executed and now to be filed by inserting the words "including just damages for delay," as provided in rule 29th of the Supreme Court.

(Signed) H. M. & WILLARD TELLER,
Att'ys for Pl'ff's in Error.
" CHARLES & DILLON,
Attorneys for Defendant in Error.

137 (Endorsed :) No. 141. Asher A. White, administrator, &c., vs. Colorado Central R. Co. Stipulation as to informalities in writ of error, citation, bond, etc. Filed Nov, 5, 1878. (Sd) Edward F. Bishop, clerk. H. M. & W. Teller for def'ts.

And the said supersedeas bond is in words and figures as follows, to wit:

Supersedeas bond.

Supreme Court of the United States.

ASHER A. WHITE, ADMINISTRATOR OF THE ESTATE of Simon White, deceaced, plaintiff,
vs.
COLORADO CENTRAL RAILROAD COMPANY, defendant.

Know all men by these presents that the Colorado Central Railroad Company, a corporation organized and existing under the laws of the State of Colorado, and William A. H. Loveland and Charles C. Welch, of the county of Jefferson and State of Colorado, are held and firmly bound unto Asher A. White, administrator of the estate of Simon White, deceased, of , in the sum of seven thousand dollars, to be paid to the said Asher A. White, administrator of the estate of Simon White, deceased, his executors or administrators or legal representatives, to which payment well and truly to be made we bind our-
138 selves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns firmly by these presents, sealed with our seals, dated this fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above named Colorado Central Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the circuit court of the United States for the district of Colorado:

Now, therefore, the condition of this obligation is such, that if the above named Colorado Central Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

The said Colorado Central Railroad Company, by its proper officers, executes this obligation and affixes hereto its corporate seal.

(Signed) COLORADO CENTRAL RAILROAD COMPANY,
By W. A. H. LOVELAND, *President.*
W. A. H. LOVELAND. [WAFER SEAL.]
CHARLES C. WELCH. [WAFER SEAL.]

Attest:
[C. C. R. R. CO. SEAL.] (S'd) FOSTER NICHOLS,
Secretary pro tem.

Taken and approved this 5 day of November, A. D. 1878, as of the 12 day of October, A. D. 1878.

(Signed) MOSES HALLETT,
District Judge.

139 STATE OF COLORADO,
Jefferson County:

William A. H. Loveland and Charles C. Welch, being first duly sworn, on their oaths say, each for himself, that he executed the above bond as surety, and that he is worth the sum of ten thousand dollars over and above his just debts, liabilities, and exemptions.

(Signed) W. A. H. LOVELAND.
" CHARLES C. WELCH.

Subscribed and sworn to before me, at Golden, in said county of Jefferson, this 15th day of October, A. D. 1878.

[CO. CT. JEFF. CO. SEAL.] (Signed) H. N. SALES,
County Judge.

(Endorsed:) No. 141. Circuit court U. S. Asher A. White, adm'r of estate of Simon White, vs. Colorado Central Railroad Company. Supersed'as bond. Filed Nov. 5, 1878. (S'd) Edward F. Bishop, clerk.

And the said writ of error is in words and figures as follows, to wit:

140 Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA:

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between Asher A. White, administrator of Simon White, deceased, as S. White & Co., and The Colorado Central Railroad Company, a manifest error hath happened, to the great damage of the said The Colorado Central Railroad Company, as by its complaint appears, we being willing that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1878, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of November, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 103d year.

[SEAL.] EDWARD F. BISHOP,
Clerk.

Allowed by—

MOSES HALLETT,
District Judge.

Nov. 5, 1878, as of the 12 day of October, 1878.

141 *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 6th day of Nov'r, A. D. 1878.

[SEAL.] EDWARD F. BISHOP,
Clerk,

By
Deputy Clerk.

(Indorsed:) Gen. No. 141. Circuit court of the United States. The Colorado Central Railroad Co., plaintiff in error, vs. Asher A. White, administrator, &c. Writ of error to court U. S. district of Colorado. Filed in court of the U. S. this day of , A. D. 18 . clerk, by deputy clerk. H. M. W. Teller, attorney for plaintiff in error.

142 And thereupon and on the same day, to wit, the 5th day of November, A. D. 1878, the following citation was issued and filed, to wit:

143 Citation U. S. circuit court.

THE UNITED STATES OF AMERICA,
District of Colorado:

The United States of America to Asher A. White, administrator of Simon White, deceased, who sues as S. White & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October, A. D. 1878, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein The Colorado Central Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 5th day of November, in the year of our Lord one thousand eight hundred and seventy-eight.

MOSES HALLETT,
District Judge.

144 *Proof of service.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

On this day of , A. D. 18 , personally appeared before me, the subscriber, a clerk of the court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation, to .

Sworn to and subscribed before me, this day of , A. D. 18 .

Clerk,

By

Deputy Clerk.

(Indorsed:) Gen. No. 141. Circuit court of the United States, district of Colorado. The Colorado Central Railroad Co., plaintiff in error, vs. Asher A. White, administrator, &c., defendant in error. Citation. Filed in court of the U. S., this day of , A. D. 18 . , clerk, by , deputy clerk. H. M. & W. Teller, attorney for plaintiff in error.

Clerk's certificate.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Edward F. Bishop, clerk of the circuit court of the United States, for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the "stipulation as to informalities in writ of error, citation, bond, &c.," the supersedeas bond, the writ of error, and the citation heretofore filed in said court, and in a certain cause lately in said court pending, wherein Asher A. White, administrator of the estate of S. White & Co., who sues, &c., and the Colorado Central Railroad Company, defendant, as fully and completely as the same still remain on file in my office.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 6th day of November, 1878.

[SEAL.] EDWARD F. BISHOP,
Clerk.

Clerk's fees: 22 fol. & c't'fc., 3.65; p'd by pl'ff in error.

(Indorsed:) Filed 19th November, 1878.

(Indorsement on cover:) No. 641. Colorado Central Railroad Company, plaintiff in error, vs. Asher A. White, administrator of Simon White, deceased, lately doing business under the firm-name & style of S. White & Co. Colorado C. C. U. S. Filed 19th November, 1878.

C

Argument of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

No. 641.

THE COLORADO CENTRAL RAILROAD COMPANY,
Plaintiff in error.

vs.

ASHER A. WHITE, ADMINISTRATOR OF SIMON WHITE, DECEASED, LATELY DOING BUSINESS UNDER THE FIRM, NAME AND STYLE OF S. WHITE & CO.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE COLORADO CENTRAL RAILROAD COMPANY, *Plaintiff in error.*	*Error from Circuit Court of the United States, District of Colorado.*
vs.	
ASHER A. WHITE, Admistrator, SIMON WHITE, Deceased.	

ARGUMENT FOR PLAINTIFF IN ERROR.

In the presentation of this, case we will conform the argument to the rules relating to Briefs.

First—The facts in the case as found and set forth in certificate of "division of opinion" of the Circuit Judges, Fol. 128 to 133, are as follows:

This is an action brought under the Civil Code of Colorado against the defendant company on a complaint containing two counts, the one alleging a liability on the part of the defendant as a common carrier of goods burned in its warehouse in Denver, January 5, 1878, the other count alleging liability as a warehouseman for the negligent loss of the said goods by said fire.

On the trial the jury found for the defendant upon the first count of the complaint, and for the plaintiff upon the second count, assessing the damages at the sum of four thousand seven hundred and four dollars and seventy-five cents.

By the statutes of Colorado a common carrier may not rid himself of liability as a carrier, except upon notice to consignee of the arrival of the goods at their destination, and a reasonable time thereafter to allow the consignee to remove the goods. On the trial the evidence tended to show that defendant received the goods in its capacity as a common carrier at Georgetown, consigned to plaintiff's testator at Denver; that the goods were received at defendant's depot in Denver on the 3d day of January 1878; that plaintiff had notice of such arrival about noon of January 4th, and that he left the depot to procure teams to take them away, but did not take them away, and that the said goods were in store in said depot at that time, and were destroyed in the depot by fire on the morning of January 5, 1878.

The evidence further tended to show that the depot was a long wooden building of nearly one hundred feet in length, having the offices of the defendant at one end; that on each side of the depot building and near the offices were large doors opening within the part reserved as a freight room, and between the offices and the place where plaintiff's goods were stored; that on the same train with plaintiff's goods came also about 240 sheet-iron kegs containing powder; that such powder was consigned to one Brinker in Denver, was unloaded after plaintiff's goods, and was stored near the office of the defendant in said depot, between the offices and the side door of depot, and from sixty to seventy-five feet from the plaintiff's goods. The evidence further tended to show that the stoves used in the building were all in the offices, and that the pipes passed into flues, and that the fire when first discovered was in the roof of the building directly over the offices and near the flues. There was no evidence tending to show negligence of defendants as to

construction of flues, or the use of the pipes or stoves in the building, and nothing to show how fire originated.

The evidence further tended to show that on the arrival of the fire department at the depot, which was situated within the city of Denver, a delay of from ten to fifteen minutes occurred in getting water to play on the building, on account of one of the hydrants being covered with snow and said to be frozen up.

The evidence also tended to show that the fact that powder was stored in the building became known to the firemen, and they were deterred from going inside the building with the hose or from approaching it as near as they otherwise would have done, except for fear of explosion of the powder.

The evidence, however, tended to show that firemen could probably have done more efficient service in extinguishing the fire but for the presence of the powder in the warehouse, though there was no witness who said goods could have been saved if powder had not been there, though one witness testified they could have saved that part of the building in which the goods were if the powder had not been in the building.

The evidence further shows that the powder was nearer fire than the goods, and also nearer the door, and that the defendant's men went to work to get out the powder, and succeeded in getting out seventy-seven kegs, when it commenced to explode; the evidence tended to show that it made no concussion, but a kind of blow-out, which may have spread the fire but did not cause any direct injury to the goods, and that the loss occurred by fire, and the water used in suppressing it, and was not caused by the explosion.

The evidence of experts in the powder business tended to show that powder in iron kegs of twenty-four pounds, as in this case, and stored in a wooden building like this depot, was not generally dangerous; that by reason of the drawing of the rivets of the kegs by heat before powder

could be reached by the fire, the powder would become so far loose powder as to explode only by a blow-out, not dangerous to parties near by unless a party should draw or breathe in the fumes and flames, which might be done within thirty feet of the explosion.

The evidence having all been received, the Court instructed the jury as follows:

"As to the second cause of action, the liability of defendant, if any exists, depends upon the effect of storing powder in the warehouse, if any was stored. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of the powder in the honse, the defendant is liable. In order to fix such liability, however, it must appear to you from the evidence that the loss was occasioned or produced by that cause. If those who were engaged in suppressing the fire would have been able to save plaintiff's goods, and would have done so, if no powder had been kept in the building, the defendant may be held. But if this is a doubtful matter, and it is uncertain whether the presence of the powder in the house occasioned the loss, the defendant is not liable. Upon that point you remember what the witnesses said about it, you determine as well as you can whether this loss certainly proceeded from that cause, from the presence of the powder. If it is doubtful in your mind upon the evidence here whether the loss was occasioned by that, that is to say, if, withdrawing the powder from the house, you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable upon that. The only act of negligence, as it seems to Court from the evidence here, was the putting of the powder there, and you must be able to ascribe that loss to that cause, and certainly to that, if you are to hold the defendant upon that; that is the position in which that matter stands."

To the giving of which instruction the defendant excepted, and a new trial was thereupon asked by defendant, and al-

leged error in giving such instruction was assigned as one of the reasons therefor, which new trial was refused.

On the trial of the cause before the jury the question arose whether under the facts and circumstances shown in evidence, the said instruction was or was not erroneous. On which question the opinion of the judges were opposed, and final judgement entered on a verdict for the plaintiff."

Second—We assign for error at the trial the giving that part of the instruction which reads as follows:

"As to the second cause of action, the liability of the defendant, if any exists, depends upon the effect of storing powder in the warehouses, if any was stored. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of the powder in the house, the defendant is liable. In order to fix such liability, however, it must appear to you from the evidence that the loss was occasioned or produced by that cause. If those who were engaged in suppressing the fire would have been able to save the plaintiff's goods, and would have done so if no powder had been kept in the building, the defendant may be held. But if this is a doubtful matter, and it is uncertain whether the presence of the powder in the house occasioned the loss, the defendant is not liable. Upon that point you remember what the witnesses said about it, you determine as well as you can whether the loss certainly proceeded from that cause, from the presence of the powder. If it is doubtful in your mind upon the evidence here whether the loss was occasioned by that, that is to say, if, withdrawing the powder from the house, you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable on that. The only act of negligence, as it seems to the Court from the evidence here, was the putting of powder there, and you must be able to ascribe that loss to that cause, and certainly to that, if you are to hold the defendant upon that. That is the position in which that matter stands."

Third—Court erred in not granting a new trial for errors occurring as above specified.

We shall endeavor in the discussion of this case to to confine the argument to the only question which the rules and practice of this Court has left open to us, viz., the alleged error in instructing the jury in the words already quoted. The facts necessary to an understanding of the case and the point to be presented, appear in the certificate above quoted, and we shall but refer to them in connection with what we have to say herein, and only so far as such facts may be important in arriving at the law of this case. Briefly, then, the facts are, a common carrier and a railroad company receives goods by consignment thereto for carriage to Denver. They arrive there on the 3d of January. The consignee has notice of arrival about noon of the 4th, and promises to take them away but fails to do so, and the goods are injured by fire and by water used in suppressing the fire on the morning of the 5th. On same day and on same train defendant carried two hundred and forty sheet-iron kegs of powder, also consigned to Denver. This powder was unloaded after plaintiff's goods and was put in the same warehouse or depot of defendant, and placed near the door and about seventy-five feet from the goods of plaintiff. The fire originated no one knows how, but immediately upon arrival defendant's employés went to work getting out goods and had got out seventy-seven kegs of powder before it commenced to blow out; that firemen were deterred from going inside the building with the hose, or from approaching as near as they otherwise would but for the powder, though the powder made no concussion, but a kind of blow-out, which did not cause any direct injury to the goods, the loss occurring by fire and water and not by explosion. The evidence of experts in the powder business was that powder in iron kegs stored as this was in a wooden building and unconfined, was not dangerous to parties near by, unless a party should draw in the fumes or flames. No witness swore that the goods could have been saved if powder had not been there, though one testified that if it had not been

there they could have saved that part of the building in which the goods were. There was no evidence showing that the slight hesitation, or as the certificate has it, the deterring of the firemen from going into the building or approaching closer to it, was injurious to plaintiff or prevented the economic use of the water in suppressing the fire.

On this state of facts we say that whether defendant was or was not guilty of negligence, causing the injury complained of, was a question of fact for the jury; that the effect of the charge was to take it from the jury, treating it as a question of law.

Negligence has been generally held to be a mixed question of law and fact in all cases where the facts upon which it depends are disputed.

Shearman & Redfield on Neg., Sec. 11.

"The extent of the defendant's duty is to be determined by a consideration of his circumstances. The law imposes duties upon men according to the circumstances in which they are called to act."

Id., Sec. 11.

Hence, what might be properly considered negligence under some circumstances, may be far from negligence under other circumstances. The question is a relative one dependent upon the surroundings, frequently referred to and governed by the definition that it is the want of such care as men of ordinary prudence would use under similar circumstances. These principles, so elementary in their character as not to need mention except as the *point d'appui* from which to conduct this argument, have been everywhere admitted and universally acted upon. In this view, the case at bar, although in this Court dependent upon the decision of one question only, must be determined by reference to the fact shown, and upon which the Court below passed in finding as a question of law, "that storing of a considerable quantity of powder in the same house with plaintiff's goods

was negligent conduct." The facts to which we now call attention as bearing upon this question of negligence, are that defendant was a common carrier; that the carriage or storage of powder by the defendant or any other person was not prohibited by law; that the powder, together with the plaintiff's goods, were stored by defendant in the usual way in its warehouse, and that as the jury found, on first count of declaration, the defendant was not liable as a carrier, the plaintiff having actual notice of arrival of goods and having failed to take them away within a reasonable time thereafter. The actual circumstances then were, that defendant stored the goods in its character of a carrier, from which liability as carrier it could not rid itself except by notice to consignee and lapse of reasonable time to take them away; and it stored the powder received by the same train in the same manner, for the same purpose and in the same place.

Now it may be true, as the Court below in its opinion (folio 119) says, "to store or deposit gunpowder in large quantities in any place in a city where it will endanger life and property is a nuisance," yet not be true that the storage by a common carrier of powder for two days, awaiting the action of consignee, who has been notified of its arrival, is a nuisance or that it is negligence. Nor is the answer to the question, whether the act of the defendant was a negligent one found by answering the question suggested by the Court below, "whether a prudent man would store a large quantity of gunpowder in a building with other goods in a populous city;" for while it may be true that a warehouseman, engaged in the business of storing goods for hire, would not ordinarily or ever store powder with other goods in a populous city, it may still be true, and it probably is true, that if this same man was acting as a common carrier, he would store powder with other goods when such storage was but incidental to his business as a carrier, stored only for a day or two, and with the expectation that it would at once be removed by the party to whom it was consigned.

Such circumstances, would, in nine cases out of ten, induce a different action in the most prudent of men, from what it would be under circumstances supposed by the Court. The question here is, what would ordinary prudence require of a prudent man in those circumstances? And does the undisputed fact that defendant was a common carrier, had received both the powder and the goods as such, and had stored these goods in one room to await the arrival of the consignee, to whom notice had been given, themselves show such storage to be an act of negligence? And that too when the injury complained of did not result from the peculiarly explosive character of the powder, but from *fire* and the water used to suppress it, the witnesses differing widely as to any dangerous quality of the powder when stored as it was in this case. Now, that what acts or omissions to act, shall be taken to make out a case of negligence is in general a question of fact, will scarcely be disputed and is too well established to need the citation of authorities; that although it is also said to be a mixed question of law and fact, it is the province of the jury to find the one, and the Court to decide the other, cannot be successfully denied. The most that has ever been held upon the claim that negligence is ever a question of law is that it is so only when the direct fact in issue is established by undisputed evidence, and such fact is decisive of the cause, that a question of law arises.

Dascomb vs. Buffalo R. Co., 27 Barb., 221.

If there is any evidence upon which reasonable men could reasonably find the fact of negligence, or otherwise, then it is a question for the jury.

Shearman & Redfield, Section 13.
Hilliard on New Trials, Chap. 11, Sec. 136 (a).

To warrant the Court in instructing the jury or in deciding what is negligence, the case must be very clear and warrant no other inference.

"Nor is it true that when the facts are undisputed the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of fact, on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by a jury."

Detroit & M. R. Co. vs. Van Steinburg, 17 Mich. 99.

If, as it is generally held, negligence is the want of that care that a prudent man would ordinarily give to like business under similar circumstances, it follows that what a prudent man would do under such circumstances is a fact that must be found, before we can say whether the party has or has not been guilty of negligence. The facts may be undisputed, the party may have done or omitted to do certain acts, and yet fair minded men might honestly differ in their judgment as to whether, under the circumstances, he was or was not negligent. The inquiry would be, what would men usually do under such circumstances? And although the situation of the party might be new, no such case under like circumstances ever having arisen, and hence no evidence of any kind as to how men of prudence had acted or would act, yet the jury may infer from their own experience or upon what their judgment tells them, as to how a man should act. Hence it cannot be true that the mere fact that the evidence is undisputed renders negligence a question of law, since, whether the facts are disputed or undisputed, with or without evidence, the question cannot be decided as one of law until somebody has first passed upon the question of fact, what a prudent man would have done; and this question may be decided, and generally is decided, wholly by the party referring to his own experience and to what he thinks he would have done in such a case.

"Consequently, a case of this kind must be left to the jury, even if there is no conflict of evidence, *unless, indeed*,

there is evidence enough to decide this point, as well as all other questions in the case."

Shearman & Redfield on Neg., Sec. 11.
Bernhardt vs. Rensselaer R. R., 32 Barb., 165.
Redfield on Law of R., 321.

And this brings us to notice the remarks of the Court below, in deciding motion for new trial (folio 124), viz.: "It is not denied, and it cannot be successfully claimed, that when the facts are established, negligence may be a necessary inference of the law to be decided by the Court." To which we say, this is true only as it is controlled by the rule above given; the facts established must be such as to decide not only the point of negligence or no negligence, but all other questions in the cause, and that is clearly shown by the very section quoted by the Court.

Shearman & Red., Sec. 10.

True it is, that defendant's warehouse was admitted to be in Denver and that the powder was stored there, and that both the powder and the goods were so stored to await the arrival of the consignee, but the question still remains, was such storage for such a purpose and time and in such place, an act that a man of ordinary prudence would have committed?

What men of ordinary prudence had done or what they would be likely to do in like circumstances was not shown. No evidence whatever was advanced thereon; it was both a question of fact and one upon which impartial men might honestly differ. As was said by this Court in Railway Co. vs. Stout, 17 Wall., 663, "certain facts" had been "clearly established from which one sensible, impartial man would *infer* that proper care had not been used and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. *

* It is assumed that twelve men know more of the common affairs of life than one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." We submit that the decision of this Court in the above cause not only covers the case, but the *facts* in the one, to wit: whether there had been sufficient care exercised to determine the question of negligence, is identical with that in the other. In neither of these cases was there any dispute as to the facts of *what* had been done or omitted, but the inference or deduction to be drawn therefrom was in the one held to be one to be drawn by the jury and not by the judge, and we fail to see how it can be held otherwise in the case at bar. No Courts have, we think, ever gone farther in the direction of holding that negligence may sometimes be taken to be a question of law than those of New York, yet even there Courts have upheld the doctrine now contended for, viz.: that in all cases where it is necessary to determine the question of negligence by reference to the inquiry what would a prudent man have done under such circumstances, it must be left to the jury, although the facts, aside from that one question, are undisputed.

See opinion of Grover, J., in Morgan vs. Brooklyn R. R., 38 N. Y., 457–8.

In Thurber vs. Harlem R. R., 60 N. Y., 331, the Court says: "Negligence is a question of fact and should usually be decided as such, especially whenever men of ordinary prudence and discretion might differ as to the character of the act under the circumstances of the case, the position and condition, of the parties." And again it says: "When the *inferences* to be drawn from the proof are not certain and incontrovertible, it cannot be decided as a question of law."

This doctrine is reaffirmed and the case last mentioned approved in the case of Hays vs. Miller, 70 N. Y., 112, and the Court there says: "Negligence is usually a question of fact, and specially so when men of ordinary prudence and discre-

tion might differ as to the character of the act under the circumstances of the case. Some acts which the experience of mankind and ordinary common sense show to be dangerous, will be recognized by the Courts as constituting negligence. Such as jumping on or off a railroad car in rapid motion, crossing a railroad track without looking whether a train is approaching, etc., but such cases *must be very clear.* When the circumstances are such that men of ordinary prudence and discretion might differ as to the character of the act, under the circumstances of the case, the question is one of fact."

So, too, in Langhoff, admt., etc., vs. Mil. and P. R. R., 19 Wis., 523, Dixon, Justice: "What may be negligence under some circumstances and conditions, may not be under others. It is not a fact to be testified to, but can only be inferred from the *res gestæ*—from the facts given in evidence. Hence it may, in general, be said to be a conclusion of fact, to be drawn by the jury under proper instructions from the Court. *It is always so when the facts, or rather the conclusion, is purely debatable or rests in doubt.*"

So in Marietta, etc., R. vs. Rickby, 24 O. St., 668, the Court says: "When the question of negligence depends on a variety of circumstances, from which different minds may arrive at different conclusions as to whether there was negligence or not, the question ought to be submitted to the jury under proper instructions."

In Beers vs. Housatonic R. Co., 19 Conn., 570, the Court says: "Whether as a want of care of whatever degree, was from its very nature a question of fact, and therefore to be decided by the jury." And again: "It is not the duty of the Court to draw inferences from the evidence, but only to pronounce legal conclusions from facts admitted or properly found."

Again, the question is discussed by Judge Cooley in Cooley on Torts, 668, and he says: "The question will often be, does defendant appear to have exercised the de-

gree of care which a reasonable man could be expected to exercise under like circumstances? To such a question a man of cautious temperament might respond that he did not; another, more sanguine and bold, might say he did. * * * If the Judge, in such a case, were to pass upon negligence as a question of law, he must, in so doing, be endeavoring to enforce a rule of a variable nature which must take its final coloring from the experience, training and temperament of the Judge himself; a rule which his predecessor might not have accepted, and which his successor may reject, not because the facts are differently regarded, but because Judges are men and men are different. As has been said in one case, it must be a very clear case indeed which would justify the Court in taking upon itself this responsibility."

To the same effect is the case of Texas, etc., R. R. vs. Murphy, 46 Texas, 356. We conclude, then, without further citation of authority, that the law as laid down by Justice Hunt in Railroad Co. vs. Stout, 17 Wall., is indisputably correct and sustained by the Courts both of this country and Europe; and that the law of that case is conclusive of this, upon the error of the Court in "advising" the jury that the act of storing powder as it was stored in this case, was negligence. There is, we think, one other error in the instruction, contained in the general tenor of the same, that if it appeared to the jury that the loss was occasioned or produced by the storing of the powder in the warehouse, the defendant was liable. The facts certified show that defendant as a common carrier, and to rid itself of liability under the statutes of Colorado, had notified the plaintiff of the arrival of the goods, and he left the depot at noon of the 4th, knowing the goods were there stored, and promising to take them away, but did not take them away. The plaintiff, it must be assumed, then elected to leave the goods in store as they then were, and he thus assumed all the risks attendant therewith, and the defendant could not be held for losses within the risk he had himself voluntarily assumed.

Beside this, the instruction appears to be erroneous in this, that the evidence shows the loss to have been occasioned wholly by the fire and the water and not by the explosion or even the burning of the powder. The nearest approach to evidence that the presence of powder caused the loss is inferential from the evidence that firemen were deterred from doing as effective work as they otherwise would by reason of the presence of the powder, and so much so that that part of the building in which the goods were might have been saved but for the powder. But this evidence of one witness was in itself a mere inference of what could have been done under other circumstances, and lacks a great deal of being proof that the loss was *occasioned* by the presence of the powder, as the goods might, and for anything that appears, would have been damaged to the same extent by fire and water, even if the building had been saved. The loss occurring both by fire and water, it could not be said that the extra water necessary to save the building, and the fire suppressed thereby, would not have damaged the goods to the same extent they were damaged. So the instruction was not supported by the evidence. There was really no evidence that the powder caused or produced the loss, such loss being by fire and water alone. Again, the error appears in that defendants are liable, if at all, only when the negligence of defendant is shown to be the proximate cause of the loss.

Without going into the discussion of what is proximate cause, at any length, we yet claim that the proximate cause of a loss must be one without which the loss would not have occurred, for even if it be admitted that more than one cause has been in operation to produce the result, it must also be admitted that if either stands in the relation of a proximate, as distinguished from a remote cause, the particular one by which the others are *caused* to operate by ordinary, necessary natural laws, must be considered the proximate one. But, says the Court below on the case, (Fol. 121): "There may be and usually is more than one

agency or means of producing a loss," and that if the fire is the proximate cause of loss, it does not follow that it is the only cause standing in that relation to the result, and that "the gunpowder in the warehouse may have contributed to the loss in such a way as to make it the proximate cause, although they were in fact destroyed by fire." But in truth the goods were not destroyed by *fire*, but were *injured* by fire and water, and thus fire and water appear to have been the cause or causes of the loss, the one was primary and accidental, the other secondary and conseqnential, made necessary by the operation of the other. The fire then, since the water was a necessity produced by it, must be held to be the proximate cause of the loss, unless, as was said by Justice Miller in Ins. Co. vs. Tweed, 7 Wall., 52. "Some new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered too remote." In that case the Court held that an explosion which produced or set in operation the fire was the proximate cause of the loss by fire, and that the fact that the fire was carried to the cotton by fire being in another building, and that the wind was blowing so as to favor the advance of the fire, could not be considered such new force or cause.

See also to the same effect, Justice Dixon in—

Kellogg vs. C. & N. W. R. Co., 26 Wis., 223.
Regan vs. N. Y. C. R, 35 N. Y., 210.

So in this case we say the fire, having originated by accident, we cannot go back of to it for a cause, and as there is *no* pretense that the loss occurred by the explosion of powder, there is no new *force* or cause intervening, and *no* evidence of that kind upon which it could be left to a jury to find that the presence of the powder and not the fire was the proximate cause, or that the two together were such cause. The fact that no damage whatever was done to the goods by the explosion of the powder is admitted, and as

there is no claim that it increased the intensity of the fire, the only action left to it is that of deterring the approach and so detracting from the effectiveness of the firemen in the suppression thereof.

And in this view it is in no sense a new intervening force; it is only a little more intensity, or a little longer duration of the primary force. It comes no nearer being a new force or a proximate cause of the loss than would the storage of kerosene oil or resinous substance, by which the fire, once lighted, might have been fed so that it could not be as easily or quickly suppressed as it would but for such storage. The Court below cites upon this point the case of Compression C. Co. vs. Fitchburg R. Co., 109 Mass., 278, but it is, as we think, inapplicable. In that case the evidence showed the fire which occasioned the injury would have been extinguished but for the wrongful act of defendant in cutting the hose. Hence such cutting was the proximate cause of the loss. In case at bar, fire and water occasioned the loss, but no witness swore, nor did any or all the evidence even tend to show that but for the powder, the goods would not have been damaged by fire or water or both. Hence the presence of the powder was not a proximate cause of the loss. Beside this, all the authorities hold that to make a party liable, not only must the damage occasioned by the wrongful act be the legitimate sequence of the act, but in all cases where the act is not in itself a distinct wrong, this sequence must be shown to have resulted from such act according to the ordinary and usual course of events. The wrong-doer is to be held only for the injuries which are the natural and probable result of the wrongful act likely to ensue under ordinary circumstances. Nor is he bound to anticipate accidents or extraordinary events, and we submit now that since the evidence in the case shows a storage of powder in the usual manner, in the usual place, and that the loss occurred by reason of an unusual, extraordinary and accidental fire, that the loss in this case was not only remote, but it was one against which defendant in storing the goods was not called upon to anticipate, and that for these reasons the judgment should be reversed.

H. M. & WILLARD TELLER,
A. H. DE FRANCE,
Attorneys for Plaintiff in Error.

REPLY OF PLAINTIFF.

IN THE

United States Supreme Court.

NO. 641.

COLORADO CENTRAL RAILROAD COMPANY,
Plaintiff in error,
vs.
ASHER WHITE, administrator of SIMON WHITE, deceased, lately doing business under the firm name of S. WHITE & CO.,
Defendant in error.

Error to the Circuit Court of the United States for the District of Colorado.

IN THE

United States Supreme Court.

NO. 641.

COLORADO CENTRAL RAILROAD COMPANY,
Plaintiff in error,
vs.
ASHER WHITE, administrator of SIMON WHITE, deceased, lately doing business under the firm name of S. WHITE & CO.,
Defendant in error.

Error to the Circuit Court of the United States for the District of Colorado.

REPLY OF PLAINTIFF.

On the first point noticed in defendant's answer—as to when negligence is a question of law—we submit the case on authorities already cited.

On the second point, stated by counsel thus, "If the storing of powder in the building with other freight was a negligent act, it was certainly a pure question of law and it became the duty of the Court so to declare it," we say the conclusion of counsel is so clearly a *non sequitur* as to need little discussion. Whether the storage of powder in case at bar, and under the facts proved, and the failure to prove others, was or was not negligence, was a fact to be found by a jury only, and only upon its being so found had the

Court the right to say that if injury had resulted to plaintiff thereby he could recover therefor. Counsel's assumption, then, that if it was a negligent act, it was therefore a pure question of law, is an assumption of the whole question to be determined.

As negligence is a relative question, the question cannot be determined by showing that powder was stored with other goods, since whether it was or was not negligence would depend upon locality, whether in a public place, etc. Nor do the authorities cited by counsel sustain his assumption, much less do they support the broad proposition laid down by him, that "it is laid down by text writers, and supported by authority, that whoever introduces gunpowder or other explosives into a building, is responsible for all damage occasioned thereby." Not one of the text writers referred to or authorities cited sustain it, nor is it now, or while reason rules, likely ever to become the law; but on the contrary, such a proposition, if not absurd, is at least opposed to well established rules of law relating to the use and enjoyment of one's own property.

Take the cases cited from 6 Hill, 308, and 1 Swan, 213, and they hold but this, that the storing of large quantities of powder in a wooden building, in a populous city, and surrounded by dwelling houses, endangers life and is, therefore, an indictable nuisance.

2 N. Y., 159, only holds that throwing detached pieces of rock, by blasting with gunpowder on one's own land, renders the party liable for damage done.

Fletcher vs. Rylands, 1 Exch., L. R., 265, simply holds that he who confines, or attempts to confine, on his own land anything, either cattle, water, or other substance liable to be mischievous or dangerous, if it escaped to the land of another, is *prima facie* liable if it escape and damages accrue. In that case it was water confined in an insecure reservoir.

The Anonymous case, 12 Mod., 342, flatly contradicts the doctrine to support which it is cited, for Ch. J. Holt there resolves, first, that to support indictment for storing powder in Brentford town there must be apparent danger, or mischief already done; second, that if a nuisance, time would not make it lawful; third, if, at time of setting up the house in which powder was kept, there were no houses near enough to be prejudiced by it, and some were built since, it would be at peril of the builder; and, fourth, that if powder was kept in such a place as is dangerous to the inhabitants or passengers, it will be a nuisance.

So of the text works cited. All refer to such a storage of gunpowder or other explosives in a public place as amounts to a nuisance. Wood on Nuisances, Secs. 73 and 142, cited, says: "Any use of property in a public place which endangers the safety, health, or convenience of the public, is a nuisance." "So the keeping of large quantities of powder in the vicinity of one's dwelling house, or place of business, is a nuisance *per se*." "So a loaded gun in a public and frequented place is a nuisance, and any person who, by its use in a public place, commits an injury, is liable therefor," and the rule is thus stated: "If the wrong or legal damages are known by common experience to be the natural, ordinary sequence of an act, and that damages naturally, according to the ordinary course of events, follows the wrong, then the wrong and the damage is sufficiently concatenated as cause and effect to support the action."

Wood on Nuisances, Sec. 142.

Wharton on Neg., Sec. 90, referred to, holds only that delivering explosives to a carrier, and not informing him of the explosive qualities, is liable to the carrier if loss occurs thereby. Sec. 851, *Id.*, that where material, dangerous unless specially guarded, is left unguarded, the party leaving it thus is liable if damage accrue thereby.

Cooley on Torts, 607, is only to the effect that "powder, or any other dangerous explosive, stored and imperfectly guarded *in the vicinty of residences*, is a nuisance."

Hence we submit, that not one nor all of the authorities cited sustain the proposition laid down by counsel, nor anyone that can sustain the Court below when it instructs, as a question of law, in the absence of any proof made or attempted, or even assumed, that the powder was stored in a populous portion of the town, or in a public place, or in the vicinity of any building whatever except the depot itself, that the storage of this powder was negligence *per se*. Because storage in a public place, near a public highway, or in the vicinity of dwelling houses, is a nuisance, is no reason for saying that such storage on private grounds, remote from public highways or dwelling houses, as in this case, is also a nuisance. To keep a pig-sty or a goose-pen in a thickly settled city, or to boil soap in such a place, is a nuisance; yet to do so on one's farm or lot, not in a thickly settled district, is not; to discharge a gun on a crowded street, or to threaten to do so, is an indictable nuisance, yet it is no offense at all to do so in the woods or on the plains. So of the storage of powder; it is a nuisance only, and it is a wrong only, when the proof shows it to have been done either in a careless manner or in a place where it endangers the life, or health, or safety of the public. If the storage of powder at any time, or in any place, is lawful, then the mere storage can never be pronounced to be unlawful, and no Court, in the absence of proof showing such storage to have been made carelessly or improperly, or in an improper place, can legally instruct that such storage is negligence. And so the very authorities cited by counsel say.

Wood on Nuisances, Sec. 852.

"The owner of land on which dangerous material is stored is bound to prevent such material from, in the ordinary

course of events, passing to injuring a neighbor. But he is not responsible further than the natural and ordinary consequences of such possession on his part; and the case against him must exclude the hypothesis of injury caused by the mischievous intervention of a stranger. So, also, he is *not liable unless negligence on his part appear.*"

The mere fact of having the article on the premises is not negligence, otherwise such negligence would always appear, and the last sentence would be nonsense. The idea that underlies the charge objected to in this case, and the argument of counsel in support thereof, is that the defendant, by storing powder in its freight depot with other goods, made an illegal and wrongful use of its land and depot, and that as the jury have found that injury resulted from such use, defendant is liable, and the endeavor is to support the charge by reference to rules of law that have no application, because the facts are not such as allow of such application. The general rule of law is that a man may use his own property in his own way, if that way be lawful, and not be answerable in damages, although such use may result in injury to his neighbor, and that a lawful act done in a lawful manner can never subject the party to an action, whatever damages may follow.

Radcliff, etc., vs. Mayor, etc., 35 N. Y., 195–200, and cases cited.

Indeed, so strong is this rule, that it has been held that if the use be lawful and the act skilfully done, no damages are recoverable by a party injured, though the actual use was made of the property for the purpose of doing the precise injury.

Mahan vs. Brown, 13 Wend., 261.

It must be admitted, we think, that the storage of powder on one's own land, for a legitimate purpose, may be a

lawful act; that to make it unlawful, there must be shown something in time, place or circumstances that make it so. And we submit that the storage thereof in a wooden building, along with other goods, does not show it to be unlawful, and that except this be shown, the act not being unlawful, cannot be charged to be, from mere storage alone, a negligent one. In other words, in the absence of any proof that such storage was in a public or otherwise improper place, or in an improper manner, the Court erred in charging that such storage was negligence or evidence of negligence.

II.

As to the second point referred to by counsel, we say, admitting the liability of defendant to be that of a warehouseman, and that it was bound to use ordinary diligence and care, and that it was not bound to receive the goods, it is true, nevertheless, that whether it did thus use ordinary care in storing powder and goods, was a question to be determined only by a jury and not by the Court.

On third point noticed by counsel, we say, admitting all that is claimed as to the salvage of the goods, we repeat what certificate of division shows. No witness swore or claimed that the goods could have been saved if powder had not been there, and to say that this salvage can be inferred from the fact that one witness swore "that but for the powder that portion of the building where plaintiff's goods were stored would have been saved," is saying a great deal, and is not fairly or legally inferrable therefrom. Beside, if this is inferrable, we submit it was one to be drawn by a jury only, and that in such a case a finding for plaintiff could be sustained as for an injury resulting from presence of powder, only when the jury had found that the presence of the powder had caused the loss either by increasing the fire that burned or the water that drowned, or by preventing the ex-

tinguishment of the fire that burned the goods; and this they did not do and were not asked to do, simply because the Court instructed them that the presence of powder was negligence, and that if the firemen would have been able to save the goods except for the powder the defendant was liable, when, as certificate itself says, there was no evidence to go to the jury upon that point. Buildings are saved every day, when the entire contents thereof are utterly ruined by the fire and water used to extinguish it; and to hold that evidence of one witness, supposititious as it must be, that but for the powder that portion of the building could have been saved, is evidence that the goods could have been saved, is stretching presumption too far. The theory was, that if powder had been absent, there would have been not more or less of fire, but more water, or that the latter would have been better directed and thus become more effectual; nor could the jury infer that if the building could have been saved from fire, this loss, occurring as it did by water and fire, could have also been avoided.

True, it does not follow, "because other agencies capable of producing injury or loss are linked with and mingled with the act of the defendant in storing the powder, the storing of the powder was not the proximate cause of the loss;" but it does follow, and is undoubtedly true, that before a recovery can be had the loss must appear to be the natural and ordinary result of such storage, so that it may appear to be the proximate cause. Suppose, now, that the injury to these goods should all have been by water, the fire never reaching them, the water having become necessary, not by the presence of powder, for it neither started nor increased the fire, but by reason of the building having caught fire, would anyone say the proximate cause of the loss was the powder? Would it not be clear that fire, and fire only, was the proximate cause, the water coming in as a secondary, consequential and necessary agent in suppress-

ing it? And this being so, the presence of the powder neither starting nor increasing the fire, as the case shows, can it be said that it was a proximate cause of the fire which burned the goods, any more than the water which drowned them? Fire and water will burn and drown goods, powder or no powder. Fire was consuming both building and goods before the firemen arrived, and long before the powder exploded or its presence deterred firemen from going into the building. Water must have been required, powder or no powder, and injury to the goods from one or the other, or both, is morally certain to follow, and would have been thus certain without any powder; and with these agencies in full play, the injury occurring from both, exactly as it might have, and, for aught that appears in evidence, would have occurred had there been no powder there, to say the presence of the powder, not the fire, is the proximate cause, is to confuse and confound the laws of physics, the rules of law, and the deductions of reason.

We submit, then, that the instructions of the Court were erroneous, and that the case ought to be reversed and a new trial granted.

H. M. & WILLARD TELLER,
A. H. DEFRANCE,
Attorneys for plaintiff in error.

ARGUMENT FOR DEFENDANT IN ERROR.

IN THE

United States Supreme Court.

NO. 641.

COLORADO CENTRAL RAILROAD COMPANY,
Plaintiff in error,
vs.
ASHER WHITE, administrator of SIMON WHITE, deceased, lately doing business under the firm name of S. WHITE & Co.,
Defendant in error.

Error to the Circuit Court of the United States for the District of Colorado.

IN THE

United States Supreme Court.

NO. 641.

COLORADO CENTRAL RAILROAD COMPANY, *Plaintiff in error,* *vs.* ASHER WHITE, administrator of SIMON WHITE, deceased, lately doing business under the firm name of S. WHITE & Co., *Defendant in error.*	*Error to the Circuit Court of the United States for the District of Colorado.*

ARGUMENT FOR DEFENDANT IN ERROR.

Whether or not the charge of the Court to the jury, on the trial of this cause, contained in the certificate of division, was correct, presents the sole question for consideration in this record. The facts upon which this charge is based are briefly as follows:

The plaintiff in the Court below sued the defendant to recover for the loss of a large quantity of goods. The complaint contained two counts, the first of which sought a recovery upon an alleged liability as a common carrier for the non-delivery of the goods; and the second as a warehouseman for their loss by reason of the defendant's negligence.

On the first count of this complaint, no question is presented in the division of opinion, and hence we dismiss it from further consideration. On the second count the jury found a verdict for the plaintiff, and it is to the charge of the Court with reference to the defendant's liability under this count that exception is made, and on which the division of opinion arises.

The evidence upon which the charge of the Court, complained of, rests, is substantially as follows:

The defendant received the goods, as a common carrier, at Georgetown, in Colorado, consigned to the plaintiff's testator at Denver, in said State. The goods arrived at the defendant's depot in Denver, January 3, 1878. The plaintiff had notice of their arrival about noon on the following day, and left the depot to procure teams to take them away, but did not return to get them. The next morning, January 5, 1878, the defendant's depot took fire and the goods were destroyed therein. The evidence shows that this depot was a long, wooden building, about one hundred feet in length, having the offices of the defendant at one end; on each side of the building, near the offices, were large doors, opening within the part reserved for a freight room, and between the offices and the place where plaintiff's goods were stored; that on the same train with plaintiff's goods came 240 sheet-iron kegs of powder, which were unloaded and stored in said depot with plaintiff's goods, nearer the offices, but between the offices and the side doors of said depot, and from sixty to seventy feet from plaintiff's goods.

The evidence further shows that the fire, when first discovered, was in the roof of the building, directly over the offices, and near the flues into which the pipes from the stoves used in the offices passed; that a delay of some ten or fifteen minutes occurred in getting water to play on the building, after the arrival of the fire department, on account of one of the hydrants being covered with snow and said to

be frozen up; that the fact that powder was stored in the building became known to the firemen, and deterred them from going into the building with the hose or from approaching it as near as they would have done, but for fear of the powder; that the firemen would have done more efficient service in distinguishing the fire but for the presence of the powder in the warehouse, and one witness said they could have saved that part of the building where the goods were stored, if the powder had not been in the building.

The evidence also showed that the powder was nearer the doors and fire than the goods; that defendant's servants attempted to get the powder out, and removed about seventy-seven kegs when it commenced to explode; that the goods were not injured by the explosion of the powder, but were destroyed and injured by fire and water; that powder in iron kegs was not generally dangerous to parties near by, unless such parties should draw or breath in the fumes or flames, which might be done within thirty feet of the explosion.

On this state of facts the Court charged the jury as follows: "As to the second cause of action, the liability of the defendant, if any exists, depends upon the effect of storing powder in the warehouse, if any was stored. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods, was negligent conduct, and if the loss was occasioned by the presence of the powder in the house, the defendant is liable. In order to fix such liability, however, it must appear to you, from the evidence, that the loss was occasioned or produced by that cause, if those who were engaged in suppressing the fire would have been able to save plaintiff's goods, and would have done so, if no powder had been kept in the building, the defendant may be held. But if this is a doubtful matter, and it is uncertain whether the presence of the powder in the house occasioned the loss, the defendant is not lia-

ble. Upon this point you remember what the witnesses said about it. You will determine, as well as you can, whether this loss certainly proceeded from that cause, from the presence of the powder. If it is doubtful in your minds, upon the evidence here, whether the loss was occasioned by that,—that is to say, if withdrawing the powder from the house, you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable upon that. The only act of negligence, as it seems to the Court from the evidence here, was the putting of the powder there, and you must be able to ascribe that loss to that cause, and certainly to that, if you are to hold the defendant upon that. That is the position in which that matter stands."

Counsel, in the argument submitted for the plaintiff in error, contend that this charge is erroneous in three particulars:

First—That the Court erred in advising the jury that "storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct." (See argument for plaintiff in error, pages 7 to 14.)

Second—That the Court erred in charging the jury that "if the loss was occasioned by the presence of the powder in the house, the defendant is liable." (See argument, page 14.) And

Third—That the evidence shows that the goods were destroyed by the fire and water, and not from the explosion of the powder, and therefore the powder was not the proximate cause of the loss. (See argument, pages 15 to 17, inclusive.)

We propose briefly to notice these points, in the order in which they are presented in the argument for the plaintiff in error.

First—When the facts are undisputed, or conclusively proven, negligence is a question of law, to be decided by

the Court. At this day we think there can be no controversy on this proposition.

Whart. on Neg., Sec. 420.
Shearman & Redfield on Neg., Sec. 11.
Sexton vs. Zett, 44 N. Y., 430.
Tarwriter vs. Hannibal and St. Joseph R. R. Co., 42 Mo., 193.
Trow vs. Vermont Central R. R. Co., 24 Vt., 497.

This view of the question is fully recognized by this Court in the case of the Railroad Co. vs. Stout, 17 Wall., 663.

That the defendant stored the powder in its depot, with the plaintiff's goods, is undisputed, as well as conclusively proven in this case. If the storing of the powder in the building with other freight was a negligent act, it was certainly a pure question of law, and it became the duty of the Court so to declare it, according to the authority cited by counsel for plaintiff in error, (Shearman & Redfield on Neg., Sec. 11.) Was, therefore, the storing of this powder in the freight depot a breach of duty constituting negligence?

It is laid down by text writers, and well supported by authority, that whoever introduces gunpowder or other explosive substances or materials into a building, is responsible for all damage occasioned by the introduction of such dangerous substances.

Addison on Torts, Vol. 1, page 308.
Wood on Nuisances, Sec. 73, 142.
Cooley on Torts, page 607.
Cheatham vs. Seaton, 1 Swan, Tenn., 213.
Myers vs. Malcom, 6 Hill, 293.
Hay vs. The Cohoes Co., 2 N. Y., 159.
Fletcher vs. Rylands, Law Rep., 1 Ech., 265, 278.
Same case affirmed in House of Lords, Law Rep., 3 Eng. and Irish App., page 330.

Anonymous, 12 Mod., page 342.
Whart. on Neg., Sec. 90, 851.

The defendant had full knowledge of the contents of the two hundred and forty kegs of powder when received and stored in its depot, and were, as matter of law, guilty of negligence in the manner in which the powder was handled. According to the authorities above cited, the keeping of the powder in the depot building was a public nuisance, *per se*, and so evidence of negligence.

Wood on Nuisances, Sec. 142.
Myers vs. Malcome, 6 Hill, 292.
Hay vs. Cohoes Co., 2 N. Y., 159.
Cheatham vs. Sexton, 2 Swan, 214, 215.

We understand that this view of the law is fully recognized in the

Nitro-glycerine case, 15 Wall., 534 to 537.

The fact of the storing of the powder being undisputed, we submit that no error was committed by the Court in advising the jury that the act of such storing was negligent conduct.

Second—On the second proposition, that the Court erred in that portion of the charge where the jury were told "if it appeared to the jury that the loss was occasioned or produced by the storing of the powder in the warehouse, the defendant was liable." We submit that the defendant, by storing the goods in the warehouse, only relieved itself from the obligations of a common carrier, but assumed the obligations of a warehouseman or bailee for hire.

Whart. on Neg., Sec. 478, 574.
Norway Plains Co. vs. Boston & M. R. R. Co., 1 Gray, 273.
Moses vs. Boston & M. R. R. Co., 32 N. H., 537.
McHenry vs. Railroad Co., 4 Harr., 451.

These authorities clearly show that the defendant, like other warehousemen, was bound to use ordinary diligence for the keeping and preservation of the plaintiff's goods. Besides this, the defendant was not bound to receive, transport or store the powder in question, as a carrier or warehouseman.

Whart. on Neg., Sec. 856.
Porcher vs. Railroad Co., 14 Richd., 184.
Boston & A. R. Co. vs. Carney, 107 Mass., 576.
Nitro-glycerine case, 15 Wall., 535, 536.

The storing of the powder was, therefore, a voluntary act assumed by the defendant, carrying with it threatened danger and calamity to the person and property of others, and for which the defendant must be held liable.

Cooley on Torts, page 607.

But we submit that the charge of the Court on this point when considered as a whole, was quite favorable to the defendant. The jury were charged, that in order to fix the liability of the defendant, it must appear from the evidence that the loss was occasioned by the presence of the powder in the warehouse, and if the jury were doubtful on this point, they must find for the defendant, thus giving the defendant the benefit of all doubts, a rule applicable only in criminal cases, and making the charge favorable to the defendant. The defendant having, therefore, with a full knowledge of the danger to be incurred, stored this powder in its warehouse with the plaintiff's goods must, we think, be held liable for all damages resulting therefrom.

Third—On the third proposition advanced by counsel in their brief, it is contended "that the evidence shows the loss to have been occasioned wholly by the fire and water, and not by the explosion or even the burning of the powder." In other words, that the evidence shows the powder not to

have been the proximate cause of the loss, and therefore the instruction was not supported by the evidence.

Now, we submit that there was evidence before the jury tending to show that the goods, together with that portion of the warehouse where they were stored, would have been saved but for the presence of the powder in the building. The evidence showed that the warehouse was a long, wooden building, about one hundred feet in length; that defendant's offices were in one end of it; that two large doors on each side of this building opened into that portion of the house used for the storing of goods; that the powder was stored between these doors and the offices occupied by defendant's employés, and from sixty to seventy-five feet from where the plaintiff's goods were stored, showing that the powder was stored in one end of this building, near the offices, while the goods of plaintiff were in the other end of the building and on the opposite side of the doors from where the powder was stored when the fire occurred. The fire, when first discovered, was in the roof of the building, immediately over the offices, and certainly a considerable distance from the plaintiff's goods; in other words, the evidence showed the fire to have been in one end of this building, and the plaintiff's goods were in the other, while the powder was between the fire and the goods, and distant from the goods some sixty to seventy-five feet. The evidence further showed that the presence of the powder prevented the firemen from entering the building at the side doors and extinguishing the fire; in fact, one witness distinctly stated that but for the powder, that portion of the building where plaintiff's goods were stored would have been saved.

Certainly, upon this state of facts, it cannot be said that there was no evidence upon which to base the instruction complained of. If that portion of the building where plaintiff's goods were stored could have been saved, certainly the jury had the right to infer, from this fact, that the goods

would also have been saved. In fact, the saving of that portion of the building from burning was the saving of the goods from the same calamity; and if the presence of the powder in the warehouse prevented the fire department from saving the goods, it is difficult to understand, in any view to be taken of the question, why the presence of the powder was not the proximate cause of the loss. It does not follow, because other agencies, capable of producing injury or loss, are linked with and mingle with the culpable negligence of the defendant in storing the powder in its warehouse, that therefore the storing of the powder was not, in fact, the proximate cause of the loss of plaintiff's goods. This view of the question is certainly sustained by the authorities.

Metallic Compression Casting Co. vs. Fichburg Railroad Co., 109 Mass., 277, 282.

Milwaukee, etc., Railway Co. vs. Kellogg, 94 U. S., 4 Otto, 474, 475.

Smith vs. London & S. W. Railway Co., 6 L. Rep., C. P., pages 14, 18, 20.

Same case, 5 L. Rep., C. P., page 98.

Oil Creek & Allegheny River Railway Co. vs. Keighron, 74 Pa. St., 316.

Grand Trunk R. R. Co. vs. Richardson, 91 U. S., 1 Otto, 471.

Whart. on Neg., Secs. 148 to 154, inclusive.

We submit, therefore, that there was evidence to justify the Court in charging the jury as was done in this case, and that the instruction is fully sustained by the authorities above cited.

It would serve no useful purpose to refer at length to the cases cited by counsel in support of the proposition that the powder was in no sense to be regarded as the proximate cause of the loss. The doctrine of the case of Ryan vs.

The New York Central Railway Co., 35 N. Y., 210, cited by counsel, has already been disapproved of by this Court in the case of The Grand Trunk R. R. Co. vs. Richardson, 91 U. S., 1 Otto, pages 471, 472, and the case from 26 Wisconsin, 223, is not unlike the case in 35 New York.

What is the proximate cause of an injury is ordinarily a question for the jury.

Milwaukee Railway Co. vs. Kellogg, 94 U. S., 4 Otto, 474.

Certainly the question of proximate cause was fairly, and most favorably for the defendant, presented to the jury in this charge. The jury were told that they must find for the defendant if they had any doubt as to whether the presence of the powder occasioned the loss of plaintiff's goods.

In connection with what is here said, we ask the Court to examine the opinion of Justice Hallett on the questions in controversy in this case, and especially so with reference to the evidence given at the trial, for the reason that this evidence is stated in this opinion with more particularity, and not in such general terms, as it is in the certificate of division.

There being testimony, therefore, to justify the giving of this instruction, and the jury having found, beyond all doubt, that the presence of the powder was the proximate cause of the loss of the plaintiff's goods, we submit that their verdict ought not to be disturbed.

J. Q. CHARLES,

Attorney for defendant in error.